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Supreme Court of the United States

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, as Secretary of State of Nebraska, *et al.*,

Appellants,

vs.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

APPENDIX
TO APPELLEES' BRIEF

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellees.

April, 1941

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Buck v. Gallagher, 307 U. S. 95 (1939).

(Washington Statute printed at p. 76, *infra*.)

Appeal from a decree of the District Court of three judges which dismissed, for want of jurisdiction, a bill to enjoin the enforcement of a statute of the State of Washington affecting the right of the owners of copyrights to combine in licensing performances of their musical compositions.

Mr. Thomas G. Haight, with whom Messrs. Louis D. Frohlich and Herman Finkelstein were on the brief, for appellants.

Mr. Alfred J. Schweppe, with whom Messrs. G. W. Hamilton, Attorney General of Washington, John E. Belcher, Assistant Attorney General, Edwin C. Ewing, Ralph E. Foley, and Sam M. Driver were on the brief, for appellees.

Mr. Justice REED delivered the opinion of the Court.

This is an appeal, under §266 of the Judicial Code, from a decree dismissing appellants' bill to enjoin the enforcement by the appellees of a statute of the State of Washington.[1] The purpose of the statute is to render illegal certain activities carried on by pools of copyright owners in authorizing by blanket licenses the performance of their musical compositions.

The statute declares it unlawful for two or more persons holding separate copyrighted works to pool their interests in order to fix prices for their use, to collect fees or to issue blanket licenses for their commercial production. Joint undertakings for this purpose are permitted if the licenses are issued at rates assessed on a per piece system of usage.

[1] Buck v. Case, 24 F. Supp. 541. Washington Laws 1937, c. 218, p. 1070.

All combinations of owners of separate copyrighted musical works are required to file a complete list of these works once each year with the secretary of state of the State of Washington, together with detailed information as to prices and ownership. There are numerous other provisions unnecessary to detail.

The appellants are the American Society of Composers, Authors and Publishers; Gene Buck, suing in his own name and as the president of the Society; and a number of other members, corporate publishers and authors, composers or their next of kin. This suit was brought by complainants on behalf of themselves and others similarly situated, members of the Society too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest. The bill alleges the organization of the Society as a voluntary, unincorporated, non-profit association under the laws of New York, and sets out that its purpose is to protect the owners of copyrighted musical works against piracies, to grant licenses and to collect royalties for the public performance for profit of the compositions of its members. These are composers, authors and publishers of musical compositions or their successors. The royalties and license fees collected by the Society are distributed from time to time, as ordered by the Board of Directors, among the members of the Society, after the payment of expenses of operation and sums due to foreign affiliated societies and after the deduction of a limited reserve fund.

In addition to the general allegation that the value of the matter in dispute is in excess of $3,000, the bill alleges that the value of each publisher's copyrights exceeds $1,000,000. The bill further shows that each individual complainant has rights to royalties and renewals worth in

excess of $100,000. It is shown by the bill that in the State of Washington there were five hundred twenty-eight contracts outstanding in 1936, all entered into in the name of the Society, from which it received more than $60,000 and that similar sums annually will be collected. Other allegations are discussed later.

On the filing of the bill, a motion was made for an interlocutory injunction and affidavits were filed in support of the request. At the time the motion for a temporary injunction came on for hearing, the defendant state officers and certain intervenors filed motions to dismiss which challenged the bill on various grounds. The district court considered only one ground: whether the value of the subject matter in dispute is more than $3,000, exclusive of interest and costs. Upon the hearing, the district court found that neither the bill nor the record shows the necessary jurisdictional value and dismissed the bill. The basis for this ruling is treated here.

Although this statute of Washington, as that of Florida,[1] is aimed at the power exercised by combinations of copyright owners over the use of musical compositions for profit, the differences between the enactments and the procedural situations require additional consideration. The Florida statute does not permit any combination of copyright owners for the purpose of licensing the use of their compositions. The prohibition is complete. In the Washington statute, on the other hand, such a combination, federation or pool is not prohibited if it issues licenses "on rates assessed on a per piece system of usage." Even upon these permitted transactions there are limitations of

[1] Considered in Gibbs v. Buck, 307 U. S. 66.

price and use, unnecessary to consider here.[3] The statute is directed particularly at the practice of issuing blanket licenses which authorize the performance of all copyrighted material belonging to the licensor. Whether a state statute is regulatory or prohibitory, when a bill is filed against its enforcement under section 266 of the Judicial Code, the matter in controversy is the right to carry on business free of the regulation or prohibition of the statute.[4] Where the statute is regulatory the value of the right to carry on the business, as was said in *McNutt v. General Motors Acceptance Corporation*, may be shown by evidence of the loss that would follow the enforcement of the statute. And this loss may be something other than the difference between the net profit free of regulation and the net profit subject to regulation. The difficulties of determining the value of rights by calculating past profits as compared

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[3] Washington Laws, 1937, sec. 3. c. 218, p. 1071, reads as follows: "It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage; *Provided, further,* This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided, further,* Where the owner, holder or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works."

[4] Prohibitory statutes—Gibbs v. Buck, *supra;* regulatory statutes—McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 181; Kroger Grocery Co. v. Lutz, 299 U. S. 300, 301.

with possible future profits, influenced by the single factor of statutory regulation, are obvious. This difference is not the only test of the value of the right in question. The value of the matter in controversy may be at least as accurately shown by proving the additional cost of complying with the regulation. This factor was not offered in evidence in the *McNutt* case.

In *Packard* v. *Banton*[5] the existence of the jurisdictional amount was partly determined by consideration of the cost of providing liability insurance required by a regulatory statute. Where a state railroad commission required the construction and service of an industrial spur which did not increase earning capacity, the cost was held to measure the jurisdictional amount.[6] The expense of producing the information required by a challenged order in a utility investigation was considered sufficient to establish the value of the matter in controversy.[7] The cost of complying with the challenged statute as a test of the value of the amount in controversy has been applied in effect in suits to enjoin the collection of taxes as unconstitutional interferences with the right to do business. In such cases "the sum due or demanded is the matter in controversy and the amount of the tax, not its capitalized value, is the measure of the jurisdictional amount."[8]

By section four of the Washington statute every combination of two or more copyright owners must file, once a year, with the secretary of state, a complete list of their

[5] 264 U. S. 140.

[6] Western & A. R. R. v. Comm'n, 261 U. S. 264, 267.

[7] Petroleum Exploration, Inc. v. Pub. S. Comm'n, 304 U. S. 209, 215.

[8] Healy v. Ratta, 292 U. S. 263, 271, and cases there cited; Grosjean v. Am. Press Co., 297 U. S. 233, 241; Henneford v. No. Pacific Ry., 303 U. S. 17, 19.

copyrighted works, under oath.[9] By section three, individuals are forbidden from joining together "for the purpose of collecting fees in this state" unless their licenses are on a per piece system of rates. In addition to the general allegation that the value of the matter in controversy exceeds $3,000, the bill alleges that the cost of compliance by the Society, the combination of members, with section four would exceed $300,000.[10] For the individual members who now have the benefits of the services performed by the Society, additional allegations set out the cost imposed upon them by the statutory regulation as being "in excess of $10,000" to each for carrying on for themselves the functions now performed for them by the Society. The motions to dismiss deny the general allegation of value, deny that there would be any cost to the Society by compliance with section four as the required list is already compiled and the expense, since the Society is non-profit, would be borne by members, and deny that the individual complainants would be put to a cost of $10,000 each. There was no allegation of the loss or cost to the Society or members occasioned by the requirement that the licenses from pooled copyrights should be issued at per piece rates.

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[9] The list must state that it "is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work."

[10] Specifically the allegation is that "The cost to the Society of attempting to compile the lists and information required to be furnished under the State Statute would be far in excess of $300,000., which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers' fees for opinions as to the rights of parties involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights of the members of the Society and of its affiliated societies with all of the data required by the State Statute."

On submission of the motion to dismiss for want of the jurisdictional value, the burden of proof was upon complainants.[11] Although the trial court called specific attention to the jurisdictional matters three months before it filed its opinion denying jurisdiction, by request for additional briefs, no evidence was offered. After the filing of the opinion and before the entry of the decree, on complainants' motion an order was entered to show cause why witnesses should not be heard on the value of the matter in controversy. The complainants furnished an uncontroverted affidavit stating that their failure to offer evidence was due to the fact that there was no denial of the facts pleaded. The offer of proof showed that it was desired "to offer the testimony of expert witnesses concerning the cost of complying with the requirements of Section 4 of the Act, and concerning the value of the property rights in question which will be affected by this Statute." The court did not reject the evidence as a matter of discretion because tardily presented. On the hearing on the rule the court made it quite clear that the proffered evidence was deemed immaterial because it showed only cost of compliance, not the value of the right to do business free of the compulsion of the statute.[12] The application to take further testimony was denied and the motion to dismiss granted "in that this cause is not within the jurisdiction of this court as a federal court." We conclude that the refusal to permit additional evidence in these circumstances was error.

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[11] McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

[12] E. g., this statement was made by the court: "Perhaps we are somewhat in the fog with respect to the matter you are trying to present but from our viewpoint it seems to us that you are urging that the value of the thing in controversy is to be measured by the cost of doing business or complying with the statute. From our standpoint we think the cost of doing business has nothing to do with the method of doing business. It is true the statute may necessitate a large expenditure but that would not mean anything because by a large expenditure you might make a much larger profit. Perhaps we don't understand each other but I think that is the basis of measuring the value of the matter in controversy."

The complainants in this case are the same as those *Gibbs* v. *Buck, supra.* In the *Gibbs* case we pointed o that the members share directly in the earnings of t Society and have a common and undivided interest in t right to license in association through the Society free the provisions of the state statute. The allegations as relationship between the Society and its members sh the same status in this case. The fact that "neither pra tice nor rule of the committee concerning the apportioni among the Society's members of the pooled license fe realized is shown,"[13] does not affect the rights membe have in the apportionment of the royalties from licen fees. These rights are granted by the articles of associ tion which are a part of the bill. *KVOS, Inc.* v. *Associat Press,*[14] relied upon below, is distinguished in the *Gib* case.

The cause will be remanded to the District Court wi directions to permit the introduction of evidence and f further proceedings not inconsistent herewith.

Reversed.

Mr. Justice BLACK dissents.

Mr. Justice FRANKFURTER took no part in the consider tion or decision of this case.

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[13] Buck v. Case, 24 F. Supp. 541, 549.

[14] 299 U. S. 269.

Opinion in Gibbs v. Buck, 307 U. S. 66 (1939).

(Florida 1937 Statute printed at p. 91, *infra*.)

APPEAL from an order of the District Court, of three judges, overruling a motion to dismiss the bill and granting an interlocutory injunction, in a suit to restrain enforcement of a Florida statute forbidding combinations of owners of copyrighted musical compositions.

Messrs. Tyrus A. Norwood, Assistant Attorney General of Florida, and Lucien H. Boggs, with whom Messrs. George Couper Gibbs, Attorney General, and Andrew W. Bennett were on the brief, for appellants.

Mr. Thomas G. Haight, with whom Messrs. Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, and Manley P. Caldwell were on the brief, for appellees.

Mr. Justice REED delivered the opinion of the Court.

This is an appeal from the order of a three-judge court refusing to dismiss a bill of complaint on motion for failure to set out facts sufficient to show Federal or equity jurisdiction, or to constitute a cause of action, and granting an interlocutory injunction against the enforcement of a Florida statute aimed at combinations fixing the price for the privilege of rendering privately or publicly for profit copyrighted musical compositions. Sec. 266, Jud. Code.

The appellant, the state Attorney General and various State Attorneys, are officers of the State of Florida charged with the enforcement of the act. The appellees, complainants below, are the American Society of Composers, Authors and Publishers, an unincorporated association organized under the laws of the State of New York; Gene Buck as president of the Society; various corporations publishing musical compositions; a number of authors and composers of copyrighted music; and several next of kin

of deceased composers and authors. This suit was brought by complainants on behalf of themselves and others similarly situated, members of the Society, too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest.[1]

One of the rights given by the Copyright Act is the exclusive right to perform copyrighted musical compositions in public for profit.[2] The bill of complaint alleges that users of musical compositions had refused to recognize this statutory right and to pay royalties for public performances for profit, and that authors, composers and publishers were unable, individually, to enforce their exclusive right because of the expense of detecting and suing for infringement throughout the United States. The Society was founded in 1914 to license performance of copyrighted music for profit and otherwise protect the copyrights. The state statute was directed at organizations like the Society and became effective on June 9, 1937.[3] So far as is important here, the statute makes it unlawful for owners of copyrighted musical compositions to combine into any corporation, association or other entity to fix license fees "for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit," when the members of the combination constitute "a substantial number of the persons, firms or corporations within the United States" owning musical copyrights. It declares the combination an unlawful monopoly, the price-fixing in restraint of trade, and the collection of license fees and all contracts by the combination illegal.

The bill attacked the statute as contrary to the Constitution and laws of the United States and the constitution

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[1] Equity Rule 38.

[2] Act of March 4, 1909, Sec. 1(e), c. 320, 35 Stat. 1075, 17 U. S. C. Sec. 1(e).

[3] Fla. Gen. Laws 1937, Vol. I, c. 17807.

of Florida. More specifically, it urged that the law impinged upon rights given by the Copyright Act of 1909, deprived complainants of rights without due process of law and without the equal protection of the laws, impaired the obligation of contracts already executed, and operated as an ex post facto law.

There was a formal allegation that the matter in controversy exceeded $3,000, exclusive of interest and costs. In addition, the bill alleged that the three publishers owned copyrights of a value in excess of $1,000,000 while each of the individual complainants owned copyrights worth in excess of $100,000; that it would cost each individual more than $10,000 to create an agency in Florida to protect himself against infringement by unauthorized public performances for profit, to issue licenses and to check on the accuracy of uses reported; that fees collected in 1936 in Florida amounted to $59,306.81 and that similar sums were expected in the future; and that in 1936 each of the three publishers received more than $50,000 from the Society and each individual more than $5,000.

A motion for a temporary injunction was made on February 7, 1938, the same day the bill was filed. Voluminous affidavits were presented in support of the motion. They tend to substantiate the allegations of the complaint on the value of the copyrights and the income from the Society. Each publisher deposed that it had received more than $50,000 from the Society in 1936, that its contract with the Society had a value in excess of $200,000, and that to fix prices on each composition for each use in Florida would require an expenditure of more than $25,000. The affidavits of the individuals showed annual incomes to them from the Society of from $3,000 to $9,000; contracts with the Society which the affiants valued in the thousands of dollars and an expense, in one instance, as high as $5,000 to comply with the requirements of the Florida statute.

On March 3, 1938, the appellants moved to dismiss on several grounds: (1) absence of jurisdictional amount; (2) failure to state a cause of action; (3) want of equity and other objections not strongly pressed at this time.

The district court granted an interlocutory injunction and denied the motion to dismiss the bill. It thought that great damage would result unless the injunction issued and that there was grave doubt of the constitutionality of the act. Its findings of fact and conclusions of law were filed about a month and a half after the per curiam decision. It found that "the matter in controversy exceeds $3,000 exclusive of interest and costs."

Federal Jurisdiction.—The issue was raised in the lower court by a motion to dismiss on the ground that it affirmatively appears "from the allegations of the bill . . . that the jurisdictional amount of $3,000.00 . . . is not involved . . . in that it appears that the suit is brought for the benefit of the members of the American Society of Composers, Authors and Publishers . . . and it does not affirmatively appear that the loss of any member of said society due to the enforcement of [the challenged act] would amount to the . . . necessary jurisdictional amount." Other jurisdictional averments of the motion state that the Society cannot suffer any loss from the legislation because it affirmatively appears that the Society divides all its proceeds from licensing between its members and affiliates and "therefore, the loss, if any, sustained due to the enforcement of said Florida laws would fall on the members of the Society, and not on the Society itself." Finally the motion sets out the lack of jurisdiction because it affirmatively appears from the allegations of the bill that the jurisdictional amount is not involved "because the plaintiffs have not shown the extent of loss or damage they would suffer by reason of the enforcement of said State law, as compared with the amount of profit they would

make by the non-enforcement of said law." As the form of the motion on the jurisdiction admitted the bill's statements, it was submitted on the allegations without the production of any evidence.

This method of testing the jurisdiction properly raises the question. No issue is made as to the standing of the Society or its members to sue. The basis of the attack is that there is a lack of the essential allegations as to the value of the matter in controversy. As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.[4] Both complainants and defendants were content to rest upon the bill and motion.

The bill alleges that the value of the matter in dispute exceeds the jurisdictional amount. Such a general allegation when not traversed is sufficient, unless it is qualified by others which so detract from it that the court must dismiss *sua sponte* or on defendants' motion.[5] In this instance, the allegation is, in effect, traversed by the language of the motion which asserts that no plaintiff has shown loss from enforcement equal to the jurisdictional amount. No other allegations are denied. By this method of attack the facts set out in the bill are left unchallenged for the court to accept as true without further proof. The burden of showing by the admitted facts that the federal court has jurisdiction rests upon the complainants. If there were any doubt of the good faith of the allegations, the court might have called for their justification by evidence.[6] In view of the unchallenged facts, federal jurisdiction will be adequately established, if it appears that for

[4] Wetmore v. Rymer, 169 U. S. 115, 120, 121; McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 184; KVOS, Inc. v. Associated Press, 299 U. S. 269, 278.

[5] KVOS, Inc. v. Associated Press, 299 U. S. 269, 277; McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

[6] McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

any member, who is a party, the matter in controversy is of the value of the jurisdictional amount,[7] or, if to the aggregate of all the members in this representative suit, the matter in controversy is of that value.

This Society, an unincorporated association with a membership of more than a thousand of the leading authors, composers and publishers of music, has received by assignment and possesses, for a five-year period which covers the time here involved, the "exclusive right to publicly perform for profit" musical compositions owned by its members. Licenses are issued by the Society to users in Florida "for the public performance for profit" of these compositions. After payment of expenses and royalties for similar rights to foreign associates, and retention of certain reserves, the receipts from licenses are divided among the members in amounts and by classifications fixed by the articles of association and the Board of Directors. The Society undertakes to protect itself and its members from piracies of the rights assigned to it. The Society has, in the absence of the challenged legislation and without now giving consideration to other objections as to the legality of its organization, a right to license which may be injuriously affected by the Florida statute. Whether this right to license flows from its limited ownership of the copyrights or by authority of its members is immaterial here. We find it unnecessary to decide whether this unincorporated association has standing to sue and confine our decision to the amount in controversy between the members of the Society and the defendants. Members, both corporate copyright owners and individual composers of music and lyrics, are plaintiffs. They represent all other members. As the members own the copyrights, less the limited assignment to the Society of the right of public performance for profit, and share in the earnings through

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[7] Grosjean v. American Press Co., 297 U. S. 233, 241-242. Clark v. Paul Gray, Inc., 306 U. S. 583.

mandatory distribution under the articles of association and not by way of dividends, they are proper parties to the action.[8] These members are real parties in interest. Because of the interposition of the statute they cannot in combination license production and collect fees in Florida. Unless the relief sought, the invalidation of the statute, is obtained, the members cannot conduct their business through the medium of the Society. They have a common and undivided interest in the matter in controversy in this class suit.[9]

The essential matter in controversy here is the right of the members, in association through the Society, to conduct the business of licensing the public performance for profit of their copyrights. This method of combining for contracts is interdicted by the Florida statute. It is not a question of taxation or regulation but prohibition. Under such circumstances, the issue on jurisdiction is the value of this right to conduct the business free of the prohibition of the statute.[10] To determine the value of this right the District Court had the admitted facts that more than three hundred contracts expiring in 1940 were in existence be-

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[8] Article XV, section 1, of the articles of association, reads as follows:

"Apportionment of Royalties—

"Section 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

"(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

"(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

"(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half (½) thereof to be distributed among the 'Music Publisher' members, and one-half (½) among the 'Composer and Author' members respectively."

[9] Cf. Troy Bank v. Whitehead & Co., 222 U. S. 39; Shields v. Thomas, 17 How. 3.

[10] Scott v. Donald, 165 U. S. 107, 114; cf. Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 334; McNeil v. So. Ry. Co., 202 U. S. 543; Bitterman v. Louisville & N. R. R., 207 U. S. 205; Packard v. Banton, 264 U. S. 140.

tween the Society and the Florida users; that in 1936 alone almost sixty thousand dollars was collected from the users, and that similar sums were expected for the remainder of the term. While the net profits of the business in Florida is not shown, the business of the Society, as a whole, is profitable. The three publisher parties receive more than $150,000 yearly and individuals more than $5,000 per year each. The cost of compliance with its requirements is evidence also of the value of the right of freedom from the act.[11] The complainants, other than the Society, allege without traverse that the cost to each one of providing individually in Florida the services now provided by the Society for each member would exceed $10,000. Whether this is annually, for the length of the agreement or for some other term is not shown. From these facts, the finding of the District Court that the matter in controversy—the value of the aggregate rights of all members to conduct their business through the Society—exceeds $3,000 in value is fully supported.

McNutt v. *General Motors Acceptance Corporation*[12] differs. There the State of Indiana had passed an act regulating, not prohibiting, the business of the Acceptance Corporation. The right for which protection was sought was the right to be free of regulation. It was to be measured by the loss, if any, following enforcement of regulation. This was not alleged or proved. In *KVOS, Inc.* v. *Associated Press*,[13] relief was sought to enjoin alleged pirating, by radio, of news furnished by the Associated Press to its members. The right for which protection was sought was "the right to conduct those enterprises free of" interference. On the issue of the value of this right, it was deposed

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[11] Packard v. Banton, 264 U. S. 140; Petroleum Exploration, Inc. v. Comm'n, 304 U. S. 209, 215; Healy v. Ratta, 292 U. S. 263; Buck v. Gallagher, 307 U. S. 95.

[12] 298 U. S. 178.

[13] 299 U. S. 269.

only that the Associated Press received more than $8,000 per month for news in the territory served by the broadcasting station and was in danger of losing the payments. The Associated Press was a non-profit corporation, operated without the purpose of profiting from its services to members and equitably dividing the expenses among them. The damage in the *Associated Press* case was to its members and this was not shown. Neither was it alleged or proved that any member threatened to withdraw or to reduce its payments.

Failure to State a Cause of Action.—The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. By the submission of the motion this issue was left to the Court on the facts alleged in the bill. The elaboration of these facts, contained in the affidavits supporting and objecting to the motion for temporary injunction, is not available for consideration, as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction.[14] Whether to grant or refuse a motion to dismiss before answer, is largely a matter of discretion for the court below.[15] Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise "grave doubts of the constitutionality of the Act" in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied. This bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for profit is prohibited by the statute; that existing contracts are impaired; property taken without compensation; recovery on extra state contracts denied and the equal pro-

[14] Polk Company v. Glover, 305 U. S. 5, 9.

[15] O'Keefe v. New Orleans, 273 F. 570; Wright v. Barnard, 233 F. 329; Doherty v. McDowell, 276 F. 728; Ralston Steel Car Co. v. National Dump Car Co., 222 F. 590, 592. Compare Kansas v. Colorado, 185 U. S. 125, 144-145; Wisconsin v. Illinois, 270 U. S. 634. Wilshire Oil Co. v. United States, 295 U. S. 100, 102-103.

tection and due process clauses of the 14th Amendment violated in manners specifically pleaded. Drastic penalties for violation of the act are provided.[16] The manner in and extent to which the challenged statute offends or complies with the applicable provisions of the Constitution will be clearer after final hearing and findings.[17] The findings here were on the motion for interlocutory injunction and on the issue of jurisdiction.

Other Assignments.—The other material assignments of error to the interlocutory order specified on the appeal are addressed (1) to the lack of equity in the bill, (2) to the exercise of discretion in ordering a temporary injunction, (3) to the lack of findings before the order of temporary injunction and (4) to the failure to strike from the bill allegations as to certain sections which deal with contract relations between the Society and users of the musical compositions because these sections are not enforced by the state officers. We treat of them briefly: (1) It is clear that there is equitable jurisdiction to prevent irreparable injury, if the sections of the state statute outlawing the Society raise issues of constitutionality. The heavy penalties for violation and the prohibition of the issue of licenses or collection of fees show the need to protect complainants.[18] (2) Upon the conclusion that the motion to dismiss should be overruled, there was no abuse of discretion in granting an interlocutory injunction.[19] The damage before final judgment from the enforcement of the act as shown by the affidavits would be irreparable. The allegations in the bill of threats of enforcement and the declaration in the affidavit of the Attorney General of the State, the officer

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[16] Fine $50 to $5,000 and imprisonment one to ten years or either. Section 8, Fla. Gen. Laws, 1937, c. 17807.

[17] Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 211-213. Polk Co. v. Glover, 305 U. S. 5.

[18] Ex parte Young, 209 U. S. 123, 165; Terrace v. Thompson, 263 U. S. 197, 215.

[19] Alabama v. United States, 279 U. S. 229, 231; Ohio Oil Co. v. Conway, 279 U. S. 813.

charged with supervision of enforcement,[20] of readiness and willingness "to prosecute any violations of said act," sufficiently establish the immediate danger from enforcement.[21] No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court. Ordinarily it would be expected that where a temporary injunction is considered necessary to protect the rights of complainants against the allegedly unconstitutional action of state officers, under a statute, a final order would follow with all convenient speed. (3) The order of the trial court was entered April 5, 1938. The findings of fact and conclusions of law were not filed until May 17, 1938, after the first assignment of errors had pointed out the omission and after the appeal was allowed. The original assignment of error, which had relied upon the failure to comply with Equity Rule 70½, was amended to show subsequent compliance but no assignment of error was made on account of the fact that the findings were out of time. The objection was taken in the statement of points to be relied upon on the appeal and in appellants' brief in the specification of errors to be urged. Better practice dictates the filing of the finding of facts and conclusions of law before or contemporaneously with the order or decree. It would be useless, however, to reverse the order granting the temporary injunction and remand the cause. The temporary injunction would now be in order. (4) In answer to the fourth objection it may be said that the issue like that of constitutionality can be more satisfactorily disposed of upon final hearing.

Affirmed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

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[20] Sec. 10, Fla. Gen. Laws, 1937, c. 17807.

[21] Terrace v. Thompson, 263 U. S. 197, 214-16; Cline v. Frink Dairy Co., 274 U. S. 445, 451-52.

Mr. Justice BLACK, Dissenting.

I believe the decree enjoining and suspending Florida's law prohibiting monopolistic price fixing should be reversed because

(1) No showing has been made that casts any doubt upon a State's power to prohibit monopolistic price fixing.

(2) Complainants (appellees here) failed to sustain their burden of showing $3,000.00 in controversy, as required by statute.

(3) The court below failed to require a bond or other conditions adequate to protect the people in Florida who might be injured by the injunction.

First. Do general allegations of unconstitutionality,[1] similarly general affidavits and general findings by the trial court show that the Florida statute against monopolistic price fixing is "novel, if not unique"[2] State legislation, and raise such "grave constitutional questions" that a Federal court should suspend the statute to permit complainants to continue exacting monopoly tribute from the public until the court hears evidence?

The enjoined Attorney General and prosecuting attorneys of Florida do not have, and expressly disclaim any duty to enforce the statute against appellees unless they combine to fix monopolistic prices. Therefore, this injunction cannot rest upon the alleged unconstitutionality of any provisions of the statute other than those prohibiting monopolistic price fixing. And allegations of the bill attacking other provisions of the statute raise only moot questions. If this record can be said to raise any "grave",

[1] Cf. Borden's Co. v. Baldwin, 293 U. S. 194, 203; Aetna Ins. Co. v. Hyde, 275 U. S. 440, 447; Public Service Commission v. Great Northern Utilities Co., 289 U. S. 130, 136, 137.

[2] Borden's Co. v. Baldwin, *supra*, 203.

"novel", or "unique" question at all, that question is whether a State has power to prohibit price fixing by monopolies in restraint of trade.

If the issue is not narrowed to this single point, approval is given to the enjoining of State officials from action which they have no duty to perform and have solemnly disclaimed both here and in the District Court.[3] In the absence of an interpretation by the Florida Supreme Court, to what more authoritative source or evidence may a Federal court turn for the meaning of the statute, than to the decision of the highest State official charged with its enforcement? He has determined that, so far as he and the prosecutng attorneys under him are concerned, appellees may license their compositions as they please, may combine to detect and punish infringers and may operate in Florida at will, provided only that they abandon monopolistic price fixing. Even as to the statutory prohibition against price fixing, all that is before us, a practice more desirable and more in keeping with our dual form of government, previous decisions,[4] and the trend of Congressional legislation,[5] would be to refrain from Federal judicial interference until the State courts are presented with an opportunity to define the statutory duties of appellants. "And . . . the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require."[6] Judicially restraining these Florida officials from action which they declare they cannot and will not take, denies to Florida

[3] Cf., Carroll v. Greenwich Insurance Co., 199 U. S. 401, 412.

[4] Gilchrist v. Interborough Co., 279 U. S. 159, 207; Fenner v. Boykin, 271 U. S. 240, 243-4; cf., Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43; and see Clark, Brandeis, JJ., dissenting, Cincinnati v. Cincinnati and H. Traction Co., 245 U. S. 446, 461.

[5] 28 U. S. C. 41; c. 726, 50 Stat. 738, 48 Stat. 775, 47 Stat. 70, 43 Stat. 938, 36 Stat. 1162, amended 37 Stat. 1013.

[6] Defiance Water Co. v. Defiance, 191 U. S. 184, 194.

the traditional respect that has been accorded State officials by this Court.[7]

Even according to the comparatively new judicial formula here applied, the only issue is whether "novel . . . unique" or "grave constitutional questions" are raised by the charge that these state officials will perform their sole duty under the Florida statute of prosecuting appellees for violations of the prohibitions against monopolistic price fixing. Paraphrasing this formula, the question here actually becomes: When complainants charge in a Federal Court of Equity that a State has passed, and its officers are about to enforce, a law against monopolistic price fixing, is there so much doubt about the power of the State to prohibit monopolistic price fixing that operation of the law must be enjoined and effect denied to it until evidence is heard by the Court?

Here, both the very bill upon which the injunction now approved was granted and affidavits of record establish beyond dispute appellees' flagrant violation of the Florida law by combining to fix prices. This combination apparently includes practically all (probably 95%) American and foreign copyright owners controlling rendition of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single compositions, and can, and does require purchasers to take, at a monopolistically

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[7] See Spielman Motor Co. v. Dodge, 295 U. S. 89, 96; Cincinnati v. Cincinnati and H. Traction Co., *supra*, 454, 455; Virginia v. West Virginia, 231 U. S. 89, 91; cf. Des Moines v. City Ry. Co., 214 U. S. 179, 184. This injunction makes strikingly pertinent the question of Justice Harlan, dissenting, in Ex parte Young, 209 U. S. 123, 179 (1908): "If the Federal court could thus prohibit the law officer of the State from representing it in a suit brought in the state court, why might not the bill in the Federal court be so amended that that court could reach all the district attorneys in Minnesota and forbid them from bringing to the attention of grand juries and the state courts violations of the state act . . . ?" His apprehensive prophecy has more than come true in the present case.

fixed annual fee, the entire repertory of all numbers controlled by the combination. And these fees are not the same for like purchasers even in the same locality. Evidence shows that competing radio stations in the same city, operating on the same power and serving the same audience, are charged widely variant fees for identical performance rights, not because of competition, but by the exercise of monopoly power. Since it appears that music is an essential part of public entertainment for profit, radio stations or other businesses arbitrarily compelled to pay discriminatory fees are faced with price fixing practices that could destroy them, because the Society has a monopoly of practically all—if not completely all—available music. When consideration is also given to the fact that an arbitrarily fixed lower rate is granted to a favored station itself controlled by another instrument of public communication—a newspaper—the ultimate possibilities for control of the channels of public communication and information are apparent.

We have here a price fixing combination that actually wields the power of life and death over every business in Florida, and elsewhere, dependent upon copyrighted musical compositions for existence. Such a monopolistic combination's power to fix prices is the power to destroy. Should a court of equity grant this combination the privilege of violating a State anti-monopoly law?[8] Does a State law prohibiting such a combination present "grave constitutional questions"?

It is my position that a State law prohibiting monopolistic price fixing in restraint of trade is not "novel" and "unique" and raises no "grave constitutional questions." The constitutional right of the States to pass laws against

[8] Cf., Cont'l Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 262, affirming 148 Fed. 939; Gibbs v. Baltimore Gas Co., 130 U. S. 396, 412. McConnell v. Camors-M'Connell Co., 152 Fed. 321; Pacific Postal Telegraph Cable Co. v. Western Union Tel. Co., 50 Fed. 493; American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 721; 1 Pom. Equity Juris. (3rd Ed.) § 402.

monopolies should now be beyond possibility of controversy. "That state legislatures have the right . . . to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question",[9] and few have challenged the power of State legislatures to ordain that "competition not combination, should be the law of trade."[10] Surely, there is presently no basis to doubt this power and to assert that its exercise raises "grave constitutional questions." As recently as 1937, this Court held that Porto Rico, with legislative powers not equal to, but "nearly as extensive as those exercised by any state legislature," could prohibit monopolistic price fixing as one of the "rightful subjects of legislation" upon which legislatures act.[11]

If the States have somehow lost their historic power to prohibit monopolistic price fixing combinations before presentation of evidence to a Federal court, at what point in our history and in what manner did they lose it? The people have not exercised their exclusive authority, by Constitutional amendment, to strip the States of their power over price fixing combinations and thus raise monopoly above the traditional power of legislative bodies.

It was expressly conceded at the bar that Florida had the Constitutional power to prohibit price fixing combinations unless the copyright laws limited this power. And, since argument of the present case, a decision rendered by us February 13, this year, made clear the principle that

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[9] Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 107. "There is nothing in the Constitution of the United States which precludes a State from adopting and enforcing [statutes which secure competition and preclude combinations which tend to defeat it] . . . To so decide would be stepping backwards." International Harvester Co. v. Missouri, 234 U. S. 199, 209. See, Atl. & Pac. Tea Co. v. Grosjean, 301 U. S. 412, 425-6; Nebbia v. New York, 291 U. S. 502, 529; Rast v. Van Deman & Lewis, 240 U. S. 342, 366-7.

[10] National Cotton Oil Co. v. Texas, 197 U. S. 115, 129; Carroll v. Greenwich Ins. Co., *supra*, 411

[11] Puerto Rico v. Shell Co., 302 U. S. 253, 260, 261.

the copyright laws grant no immunity to copyright owners from statutes prohibiting monopolistic practices and agreements. We there declared that "An agreement illegal [by statute] because it suppresses competition is not any less so because the competitive article is copyrighted."[12]

"Due process" has been judicially endowed with great elasticity in relation to property rights, but it is inconceivable that it would afford refuge for monopolies deemed undesirable by the people's representatives. When a legislature as a matter of public policy determines to prohibit monopolistic combinations, we cannot, under any doctrine of "due process", rightfully "review their economics or their facts."[13] And, although "due process" is invoked, can evidence either add to or take from the legislative power to permit, regulate or prohibit monopolies in the public interest?

Several of the general allegations in the bill are relied upon to justify suspension of the Florida statute until evidence is heard by a court. It is said the court should hear evidence because the "bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for profit is prohibited by the statute . . ." But what evidence can the court hear that will assist it in comparing the statute with the copyright laws? The Florida statute does not even purport to prohibit the "performance of compositions for profit," and the enjoined officials have neither threatened, nor do they intend, to prohibit such performance. It is said the bill alleges "that existing contracts are impaired" by the statute. But no contracts can be affected unless involving prohibited monopolistic price fixing. That the Florida law prohibits the continuation and execution of monopoly practices in pursuance of price fixing

[12] Interstate Circuit, Inc. v. United States, 306 U. S. 208, 230.

[13] Central Lumber Co. v. South Dakota, 226 U. S. 157, 161.

agreements made before the law was passed, can be no basis for constitutional objection.[14]

It is said the bill alleges "property taken without compensation." If the statute, of itself, takes property, (and no charge of unconstitutional application of the statute is made) is evidence required to show the manner of the taking? It is said the bill alleges that the statute violates "equal protection." But the sole thing threatened is prosecution of an admitted price fixing combination—comprised of practically all the musical copyright owners and publishers in the nation. " . . . if an evil [of monopoly] is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation."[15] It is said a drastic penalty is provided for practicing price fixing. What evidence will serve to enlighten the Court on the statutory penalty? That penalty is set out clearly in the statute. If it invalidates the statute, that determination should be made now.

The present case illustrates how the recently fashioned judicial formula under which state laws must be enjoined if "grave constitutional questions" are presented in a complaint, actually results in an automatic judicial suspension of state statutes upon any general complaint to a federal court. The apparently inevitable operation of this formula runs counter to the Tenth Amendment intended to preserve the control of the States over their own local legislation, and opens the door to further evasions of the Eleventh Amendment protecting the States

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[14] Waters-Pierce Oil Co. v. Texas (No. 1), *supra*, 108.

[15] Carroll v. Greenwich Ins. Co., *supra*, 411; Central Lumber Co. v. South Dakota, *supra*, 160. "A legislature may hit at an abuse which it has found, even though it has failed to strike at another." United States v. Carolene Products Co., 304 U. S. 144, 151.

from suits in federal courts.[16] A lower federal court's refusal in its "discretion" to suspend a State statute was recently reversed because "grave constitutional questions"—requiring evidence—were deemed raised by charges that the statute by requiring citrus fruit cans to be truthfully labeled violated the Constitution.[17] And here, where the District Court enjoined a State law in its "discretion", the injunction is sustained by a holding that evidence should be heard because "grave constitutional questions" are involved. However the lower court's "discretion" may be exercised, the formula apparently achieves but one result—state statutes are suspended.

Careful scrutiny of appellees' bill for injunction reveals no allegations indicating that Florida's power to prohibit monopolistic price fixing would, even under the formula applied, be altered by proof of any "particular economic facts . . . which are . . . properly the subject of evidence and of findings."[18] True, the bill alleges that the statute of Florida and similar legislation enacted by other States were "sponsored by an organized group . . . for their own selfish aggrandizement . . . without an adequate hearing being afforded to complainants and others similarly situated," and that "in truth and in fact, [the statute] was enacted not in the public interest . . . ." Appellees also allege that "unless the enforsement of this State statute is restrained . . . other States, in addition to Florida, Montana, Washington, Nebraska and Tennessee, may enact similar statutes . . . all of which would work undue hardship on complainants and would violate the spirit of the Constitution . . . ." These are some of the strongest—if not the strongest—of the

[16] Cf. Ex parte Young, 209 U. S. 123, Harlan, J., dissenting, 168-204; and see Fitts v. McGhee, 172 U. S. 516, 528, 530; In re Ayers, 123 U. S. 443, 496, 497, 505.

[17] Polk Co. v. Glover, 305 U. S. 5.

[18] Borden's Co. v. Baldwin, *supra*, at 210.

bill's allegations deemed to raise "grave constitutional questions." Is the temporary injunction approved so that the Federal court in Florida may hear evidence on what constitutes the public interest of Florida? Shall the court hear evidence to determine whether or not "unless the enforcement of this statute is restrained" other States, "in addition to Florida", may similarly prohibit appellees' monopoly?

It is difficult to perceive how in the future—under this formula—any state law, directly or indirectly affecting ings have dragged their weary way through federal property, can become effective until injunction proceedings have dragged their weary way through Federal courts. All state statutes might hereafter well substitute for the expression "to take effect within" a certain period of time, the words "to take effect after the Federal courts have heard evidence to determine" their reasonableness (wisdom). And the formula likewise fits Congressional enactments. Had the pronouncement of this formula not been the culmination of gradual judicial advances, it would have been everywhere recognized as a revolutionary departure from our constitutional form of government, under which the wisdom of legislation, within the field of legislative action, was left to the judgment of elected representatives of the people.

Florida can find little comfort in the admonition that "Ordinarily it would be expected that where a temporary injunction is considered necessary . . . a final order would follow with all convenient speed." This law has now already been suspended for a year, and experience demonstrates that injunctive suspension of state laws and state action can hang in the courts for many years before receiving final disposition.[19]

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[19] See dissent, McCart v. Indianapolis Water Co., 302 U. S. 419, 435, and note.

Second. Jurisdictional Amount.

These eleven appellees alleged in their bill for injunction that they sued on behalf of themselves and the more than 1,000 other (American) members of the Society. No determination is made here "that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount"—$3,000. However, while appellees are not aided in establishing the jurisdictional amount by the "allegation that [they] . . . sued on behalf of others similarly situated,"[20] the Court nevertheless holds that the jurisdictional amount is in controversy in "the value of the aggregate rights of all members" (including the more than 1,000 who have not appeared in person) to combine and fix prices in Florida.

"Assuming that such a case as this will be called a class action, and . . . could be maintained as such . . . yet that it may be properly a class action does not affect the rule against aggregation [of claims for making up the jurisdictional amount], because [such aggregation] . . . is necessarily only applicable to those class actions in which several claimants to a fund are joined as plaintiffs asserting common and undivided rights therein."[21] Appellees assert no common and undivided rights in any fund[22] or property;[23] "the amount payable to each [by the Society] depends upon his contract alone."[24] Neither does appellees' bill seek, as would the traditional class or representative bill in equity, to protect group rights all claimed under and traceable to a single decree,[25] or rights "which . . . [no one plaintiff] can enforce in the absence

[20] Lion Bonding Co. v. Karatz, 262 U. S. 77, 86.

[21] Eberhard v. Northwestern Mut. Life Ins. Co., 241 Fed. 353, 356, referred to with apparent approval in Lion Bonding Co. v. Karatz, *supra*.

[22] Smith v. Swormstedt, 16 How. 288.

[23] Beatty v. Kurtz, 2 Pet. 566.

[24] Eberhard case, *supra*, 356.

[25] Shield v. Thomas, 17 How. 3, but see Chapman v. Handley, 151 U. S. 443.

of the'' others because derived from a single security instrument.[26] In this proceeding, all that members of the Society have in common is their alleged right to violate with impunity the Florida statute against price fixing. Unless opposition to and violation of the statute can be their bond of unity, appellees have "separate and distinct demands . . . [united] for convenience and economy in a single suit, [and] it is essential that the demand of each be of the requisite jurisdictional amount."[27]

Permissible joinder of many plaintiffs as a matter of convenience and economy is not a means of enlarging the jurisdiction of the District Court. Rule 38, under which this class or representative suit was brought, did not, in fact could not, extend that jurisdiction which depends solely upon Acts of Congress.[28]

A common desire to disregard a state law cannot serve as a common and undivided interest for purposes of federal jurisdiction;[29] otherwise, all who oppose such a law can aggregate the values of their alleged individual rights so to disregard the law, in order that they may escape the courts of a State and bring its law before a Federal court. And the fact that a State law inflicts pecuniary loss upon members of a non-profit association because of their membership does not permit aggregation of the members' pecuniary interests as a basis for attack upon the law in a federal court by some members "on behalf and with the authority of all."[30] Here, the individual members

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[26] Troy Bank v. Whitehead & Co., 222 U. S. 39, 41.

[27] *Id.* 40.

[28] Alaska Packers v. Pillsbury, 301 U. S. 174, 177; Christopher et al. v. Brusselback, 302 U. S. 500, 505; see, KVOS, Inc. v. Associated Press, 299 U. S. 269, 279.

[29] Pope v. Blanton, 10 F. Supp. 15, 18, dismissed per curiam for lack of requisite jurisdictional amount in controversy, 299 U. S. 521; Gavica v. Donaugh, 93 Fed. (2d) 173.

[30] Rogers v. Hennepin County, 239 U. S. 621. The complaint appears in the original records of this Court, No. 411, Oct. Term 1915. Cf. Robbins v. Western Auto Ins. Co., 4 Fed. (2d) 249, cert. den., 268 U. S. 698; Woods v. Thompson, 14 Fed. (2d) 951, and Illinois Bankers' Life Ass'n v. Farris, 21 Fed. (2d) 1014, cert den., 276 U. S. 621.

have made no showing of what they as individuals have at stake—or of what all the members as a class stand to lose by virtue of the Florida law.

The enjoined state officials have only the duty to prosecute appellees if they continue to fix prices (i. e., to issue licenses) through monopolistic combinations, and these officials have expressly disavowed any intention to do more.[31] Appellees are left free to form such combinations as they please in Florida for the purpose of protecting against copyright infringements. They are here deprived by the Florida statute only of the right to combine to fix prices, and the value of that right must determine the amount in controversy.[32] That right was the object which appellees' bill for injunction sought to protect from allegedly unconstitutional interference.[33] Yet, there is no evidence at all in the record from which even an inference can be drawn as to the amount, if any, individual appellees or other members might lose in Florida by selling or licensing their copyrighted articles individually (which the law permits) instead of fixing prices by monopolistic combination (which the law prohibits). No showing was made that appellees ever have made or ever will make any profit from the operations of the Society in Florida. As stated by the majority opinion, the record discloses that the business of the Society in the entire United States and sixteen foreign countries is a profitable one. But we cannot assume from this that its Florida operations are as a unit profitable. In fact, the record shows only that the entire Society had sixty thousand dollars worth of contracts in Florida in 1936. We are not told what ratable share of this sixty thousand dollars would come to any individual in the division of the entire amount among the

[31] Cf., Carroll v. Greenwich Ins. Co., *supra*, 412.

[32] Scott v. Donald, 165 U. S. 107, 114, 115.

[33] Cf., Glenwood Lt. Co. v. Mutual Lt. Co., 239 U. S. 121, 125, 126; KVOS, Inc. v. Associated Press, 299 U. S. 269, 277.

forty-five thousand odd members affiliated with the Society (in America and abroad). Each individual member's gross income from Florida might be less than $1.50 per year.

The loss of a right to an annual gross income of $1.50 cannot amount to the loss of a right valued at ten thousand dollars—as appellees allege—on the theory that it would cost ten thousand dollars to collect the $1.50 income individually. And it is, of course, possible that if the Society in fact has no net income from Florida but operates there at a loss, each member's ratable share of income from the Society will actually be increased when the unprofitable Florida operations cease because of the statute. Measuring the amount in controversy on the above theory, jurisdiction might be obtained by a Federal court to enforce rights of a value far less than the jurisdictional $3,000 required by Congress. For illustration, a statute might prohibit parking of automobiles on certain city streets; an automobile owner assailing the law might be admitted to the jurisdiction of the Federal court by alleging that it would cost him more than three thousand dollars to purchase a parking lot in which to park off the streets of the prohibited area. He would thus "comply" with the statute and abandon the streets in obedience to it.[34] I do not believe that jurisdiction of a Federal court can be rested on measurements of the imagined cost of what a complainant conceivably could, but certainly would never do as an alternative to action forbidden by statute.

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[34] "Cost of compliance" with an assailed legislative act may be considered the measure of the amount in controversy when a right of complainant is regulated, or where he is required to take affirmative action. Cf., Kroger Gro. Co. v. Lutz, 299 U. S. 300, 301; McNutt v. Gen. Motors Etc. Corp., 298 U. S. 178, 181. But appellees have not been required to take any affirmative steps, nor are they permitted to fix prices on condition that they "comply" with regulations. The fixing of prices through combinations has been prohibited. Obviously, appellees cannot be prohibited from doing that which they may also do by "complying" with the statute.

The statutory monetary standard is precise and the amount in controversy therefore cannot be conjectural. "It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.

"Accordingly this Court has uniformly been strict to adhere to and enforce it."[35]

Without proof of the amount each appellee or member has in issue, how can the "aggregate amount" be fixed at any figure?

Rigid enforcement of the jurisdictional requirement will limit the interference of Federal courts in State legislation and will accord with the policy of Congress in narrowing the jurisdiction of Federal courts by successive increases in the jurisdictional amount.[36] "The policy of the statute calls for its strict construction."[37] Since no individual complainant has established that he has the statutory jurisdictional amount in controversy, to rest jurisdiction of a Federal court on no more than the unified desire of many complainants to violate a State statute prohibiting monopolistic price fixing, does constitute a "novel, if not unique," and "grave" judicial departure from the jurisdictional requirement fixed by Congress.

Third. The otherwise complete suspension of Florida's law was limited only by the condition that appellees make bond of five thousand dollars payable to the Attorney General of Florida and the District Attorneys of the State. Manifestly, these officials have no individual interest in the monopoly prohibited by the Florida law. The major injuries accruing from the suspension of the law will not be inflicted upon them, but upon the People of Florida who are required to pay monopoly prices while the law remains

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[35] Elgin v. Marshall, 106 U. S. 578, 581.

[36] See Healy v. Ratta, 292 U. S. 263, 270.

[37] *Id.*

enjoined. Thus, while the law is suspended, these nonresident appellees can carry on a monopolistic business in Florida contrary to its prohibitions, and the people of Florida who must pay monopoly prices are granted no protection. We have recently declared the governing principal that "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interest the injunction may affect.[38] The injunction here was not granted upon conditions that would protect the interests of all who might be affected by it. It neither ordered the monopoly tribute exacted by appellees to be paid into court during suspension of the Florida statute, nor required a bond for the benefit of, and adequate to indemnify those who must pay this tribute until the court permits the statute to go into effect.

Nevertheless, this Court now refuses to correct the grossly unjust failure to protect those who may suffer irreparable injury from the suspension of the Florida law on the ground that "No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court." However, the lower court has already exercised its control resulting in manifestly injurious error apparent on the record.[39] And as "upon this appeal in equity the whole case is before us, we can render such decree as under all the circumstances may be proper."[40] Litigation is not a game in which justice can be awarded only to the alert

[38] Inland Steel Co. v. United States, 306 U. S. 153, 157.

[39] See, Lamb v. Cramer, 285 U. S. 217, 222; United States v. Tennessee & Coosa R'd, 176 U. S. 242, 256; Revised Rules of the Supreme Court of the United States, 27, paragraph 6; cf., Mahler v. Eby, 264 U. S. 32, 45.

[40] United States v. Rio Grande Irrigation Co., 184 U. S. 416, 423; Cincinnati v. Cincinnati & H. Trac. Co., *supra*, 454; Ridings v. Johnson, 128 U. S. 212, 218; cf., Patterson v. Alabama, 294 U. S. 600, 607.

and fastidious objector, particularly when—as here—a court suspends statutory rights of members of the public who, not being in court, have no opportunity to object. The injustice to the public apparent on this record violates the rudimentary principles of equity and fair play. We should neither condone nor permit it.

They who attack the constitutionality of a law, obtain its judicial suspension, and then continue to violate its terms, should not benefit by the suspension, in the event the law is later held constitutional. Otherwise, a judicially granted period of immunity will reward litigants who unsuccessfully assail the constitutionality of legislation. Seemingly, the time has arrived when despite our constitutional system of government no State law can become effective until a federal court hears evidence on its constitutionality. The courts—responsible for this fundamental change—should at least protect citizens of an enacting State from disobedience to a state law permitted by an erroneous or improvident interlocutory injunction.

The interlocutory injunction should be vacated.

Opinion in
Buck v. Gibbs, 34 F. Supp. 510 (N. D. Fla. 1940).

(Florida 1937 Statute printed at p. 91, *infra*.)
(Florida 1939 Statute printed at p. 104, *infra*.)

In Equity. Action by Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, and others against George Couper Gibbs, individually and as Attorney General of the State of Florida, and others to enjoin enforcement of Florida statutes relating to copyrighted musical compositions.

Injunction granted against enforcement of one statute and certain sections of another statute and denied as to remainder of the latter statute.

Frank J. Wideman, of Washington, D. C., and Manley P. Caldwell, of West Palm Beach, Fla. (Louis D. Frohlich and Herman Finkelstein, both of New York City, of counsel), for plaintiffs.

George Couper Gibbs, Atty. Gen., of Florida (Thomas J. Ellis, Asst. Atty. Gen., Lucien H. Boggs, Sp. Asst. Atty. Gen., and Andrew W. Bennett, of Washington, D. C., of counsel), for defendants.

Before HUTCHESON, Circuit Judge, and LONG and BARKER, District Judges.

HUTCHESON, Circuit Judge.

Plaintiffs are owners of musical copyrights or rights of renewal therein, which have been pooled with the American Society of Composers, Authors and Publishers, hereafter called ASCAP. Defendants are the state officers charged with enforcement of the two statutes the suit brings in question. As originally brought, the suit was to enjoin

the enforcement of Chap. 17807, Laws of Florida, 1937.[1] There was a temporary injunction, an appeal and an affirmance.[2] After the enactment of Chapter 19653, Florida Laws, 1939,[3] it was extended by a supplemental bill to include that chapter in its scope and to obtain injunctive relief, temporary and permanent as to it.

The claim of the original and the supplemental bills in general was: that the statutes were confessedly aimed at ASCAP and its constituent members and were class legislation of the most indefensible kind and that in

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[1] 1937 Act, Chapter 17807.

Section 1. Prohibits combinations of authors, composers, publishers, owners of copyrighted vocal or instrumental musical compositions from forming any society, association, partnership, corporation or other group or entity, when the members therein constitute a substantial number of those owning or controlling copyrighted vocal or instrumental musical compositions and when one of the objects of such combination is the determination and fixation of license fees, required by such combination for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit, declares the association so formed unlawful, prohibits the collection of license fees so fixed and makes persons collecting or attempting to collect them subject to the penalties of the Act.

Section 2-A. Requires selling prices to be stated on sheet music or records and gives purchaser general public performance rights to use for all purposes on paying such price.

Section 2-B. Provides if selling price not so fixed, purchaser of the composition may use the composition privately or publicly without further license fee and exempts such purchaser from accountability to the copyright owner.

Section 2-C. Declares against purpose to give a purchaser general right to resell or distribute; or to prevent copyright holders from determining prices not in combinations forbidden in Section 1.

Section 3. Declares void existing contracts contrary to the Act and makes their attempted enforcement illegal.

Section 4-A. Relieves Florida broadcasting stations from payment of license fee for re-broadcast of copyrighted music controlled by a combination prohibited by Section 1.

Section 4-B. Similarly forbids collection by outside station of license fees to unlawful combination.

Sections 5-A and 5-B. Counterparts of Section 4-A and 4-B, except relating to theatres, etc.

Section 6. Concerning music broadcast or emanating from without the state, makes outside source of emanation solely liable for compensation to copyright owner and deprives owner of right to collect from Florida user.

Section 7-A. Provides for service of process on agent of outside combination.

Section 7-B. Declares such an agent a part of the combination for which he acts and as such, subject to all the penalties of the Act.

addition to violating the equal protection, liberty of contract and due process clauses of the Fourteenth Amendment, they violated various other constitutional provisions, Federal[4] and State.[5]

In particular the claim as to ASCAP was that it had been organized not to increase, or obtain unfair, prices for the performing rights of copyrighted musical compositions, but to protect authors, owners and publishers from the systematic piracy of their performing rights which, acting alone, they were powerless to prevent. And there was the further claim as to it that by fair and reasonable contracts and arrangements, it had at the same time afforded full public use of and access to copyrighted musical compositions at fair and reasonable prices, and secured to copyright owners, the benefits of the copyright law. While the claim as to the statutes in question was that they

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Section 8. Penalty clause for violation of Act.

Section 9. Confers jurisdiction on circuit courts and designates state attorneys under Attorney General to enforce public rights and penal provisions, particularly to dissolve unlawful combinations and otherwise enforce Section 1.

Sections 10-A and 10-B. Confers jurisdiction on circuit courts in private suits under the Act.

Sections 11-A and 11-B. Provides for discovery of documentary evidence and penalty for failure to produce same.

Section 12. Severability clause.

Section 13. Makes act and rights thereunder cumulative to rights and remedies under existing law.

Section 14. Effective date. (Approved and effective June 9, 1937.)

[4] Gibbs v. Buck, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 1111.

[5] 1939 Act, Chapter 19653.

Section 1. Definitions. Defines blanket license as including any device whereby public performance for profit is authorized of the combined copyright of two or more owners. The term blanket royalty or fee includes any device whereby prices for performing rights are not based on the public performance of individual copyrights.

Section 2. (Disclosure section.) Requires seller of public performance rights in copyrighted music to file with Comptroller a list showing name and title of composition, date and number of copyright, names of author, publisher and present owner and owner of performance rights, with provision for filing additional lists and filing fee of two cents per composition; also for filing affidavit describing rights intended to be sold and verifying the statements in the listing or registration, with name, agent, occupation, residence and authority of affiant.

had been enacted, not in response to a public need, to make effective the general will of the people of Florida, but at the instigation of an organized group or band of radio broadcasters and other users of music in order that, the association stricken down and outlawed in Florida, they might with complete impunity again pirate the performing rights to copyrighted musical compositions without making payment to the owners therefor. As to the 1937 statute, the claim in general was that, though put forward as an anti-monopoly statute, it was really a statute designed and enacted, in the interest and at the behest of this anti-copyright group, to deprive the members of the society of the protection, in Florida, of the copyright laws. In particular it was that, by at once outlawing ASCAP and providing for the performance, without compensation to them, of the copyrighted vocal or instrumental

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Section 3. Makes such lists available for public inspection and taking copies "in order that any user . . . may be fully advised concerning the performing rights . . . and avoid being overreached . . . and avoid committing innocent infringement." Comptroller may publish lists and must give certified copies and anyone selling, licensing or otherwise disposing of performing rights, must exhibit them.

Section 4-A. Makes it unlawful "for two or more owners" of musical or dramatics musical copyrights to associate or combine together for purposes of issuing blanket public performance licenses upon a blanket royalty or fee unless each owner or such combination shall make available to each user of such composition within the state the right to perform each at a price established for each separate performance by filing with the Comptroller either as part of the list under Section 2 or separately a schedule or prices for the performing rights to each separate performance with affidavit that such price was fixed by the copyright owner alone and not in combination with other owners—with provision for reasonable classification by uses if without unreasonable discrimination; and for filing new schedules at any time effective seven days from filing, and for public inspection of publication of schedules.

Section 4-B. Provides any person issuing a blanket license shall file verified copies of blanket performance license with Comptroller within thirty days after issuance and fixes filing fee.

Section 4-C. Prohibits the sale or license of performing rights to any musical composition for a compensation based "in whole or in part on any program not containing any such composition," and makes illegal and invalid any charge for compensation so based.

Section 4-D. Makes sale of public performance rights or collection of compensation unlawful if composition not listed as provided in Section 2.

Section 5. Performing rights owner must authorize Secretary of State to accept service of process and copy shall be mailed him by Secretary.

musical compositions of its members, the statute undertook in effect to nullify the copyright laws and to take plaintiffs' properties in their copyrighted compositions without compensation and without due process.

As to the 1939 statute, the claim was that its rigorous provisions for registration, its prohibitions against and restriction on blanket licensing, its prohibitions against collection of compensation when based in whole or in part on any program not containing such composition and its general provisions for filing fees, taxes, etc., are so in derogation of the rights of owners under the copyright

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Section 6. No action to be brought without prior compliance with Act. Comptroller to furnish copies of any papers at same fees as clerk of circuit court.

Section 7. Imposes three per cent tax on gross receipts, provides for annual tax return, inspection and audit of books by Comptroller and provides for means of collection.

Section 8. Makes unlawful public performance of compositions without authority of owner if he has complied with the statute.

Section 9. Makes violations misdemeanors under general law.

Section 10. Makes agents of owners subject to the statute.

Section 11. Confers on circuit courts jurisdiction of private suits.

Section 12. Confers on circuit courts jurisdiction of enforcement of public rights by state attorneys under Attorney General upon complaint of a person aggrieved.

Section 13. If prosecuting officers fail to act, aggrieved party may bring such civil action as state officers might have brought.

Section 14. Appropriates taxes above expenses to general revenue fund.

Section 15. Supersedes inconsistent laws with express saving clause as to prior lawful contracts and "any of the statutes of the State of Florida pertaining to monopoly or restraint of trade" including but not limiting the generalities of the foregoing sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14, Chap. 17807, Laws of Florida, 1937. Provides for filing copies of existing contracts within thirty days and for compliance otherwise with Act within thirty days.

Section 16. Severability clause.

Section 17. Effective date. (Filed and effective June 12, 1939.)

[4] The Copyright Clause (Art. 1, Sec. 8, Cl. 8) and the Federal Laws enacted pursuant thereto; the Impairment of Contract Clause (Art. 1, Sec. 10); the Privileges and Immunities Clause (Art. 4, Sec. 2); the Interstate Commerce Clause (Art. 1, Sec. 8, Cl. 3).

[5] The privilege against self incrimination (Sec. 12, Declaration of Rights); the prohibition of cruel and unusual punishment (Sec. 8, Declaration of Rights); the Equal Protection and Liberty of Contract Clauses (Sec. 1, Declaration of Rights).

law, and so onerous, that they amount to an illegal taking for private use, that is, for the benefit of broadcasters and other users, of plaintiffs' rights in and under their copyrights.

The defense in general was: a denial that the legislation was oppressively or partisanly conceived and that it operated in violation of any constitutional protection, and an assertion that it aimed at and constitutionally reached, the evils of a combination, to fix prices and in restraint of trade. A combination, organized and operating to fix the prices to be paid for, and to restrain freedom of trade in, the public performance of individual copyrighted musical compositions at a fair price per use, by blanketing them together under general licenses covering many compositions of many owners, authors and composers, and refusing to license or permit the licensing individually and per use of particular compositions. In particular the defense as to the 1937 Act was: that it was an anti-monopoly Act and that taken as such it was valid; that sections 2-A and 2-B and 6, which purport to authorize the performance within the state of copyrighted musical compositions without payment by the users therefor, have been repealed by the 1939 Act; and that the remaining sections are valid and the Act as to them must stand as an anti-monopoly Act condemning and making illegal, combinations like those of ASCAP and the other plaintiffs.

As to the 1939 Act, the defense was: that it is in general an Act for disclosure, and as such is valid under Allen v. Riley, 203 U.S. 347, 27 S.Ct. 95, 51 L.Ed. 216, 8 Ann.Cas. 137; and that its other provisions requiring blanket licenses by two or more persons and prohibiting sales or licenses at a price, based other than on a use in a program of the particular music sold or licensed, are mere regulatory measures to reach and do away with the evils of blanket licensing in all its forms.

With their contentions thus put forward, plaintiffs and defendants ring the changes on their respective arguments. Plaintiffs urge upon us that ASCAP is a beneficial, defendants that it is an evil institution; plaintiffs that the copyright laws protect them from the legislation; defendants that copyright owners may not, any more than others, form combinations to monopolize or restrain trade. If the case were as simple in its issues as each contender thinks it is, if it turned, on the one hand, simply on whether plaintiffs had rights and, on the other, as simply on whether these rights were subject to regulation, we could and would end it quite simply by saying to defendants, "The plaintiffs certainly do have rights in their copyrighted musical compositions", and to plaintiffs, "These rights are certainly not beyond reasonable state regulation."

But the answer to the questions the suit raises is not so simply found. For conceding both plaintiffs' rights and the State's power to subject them to reasonable regulation, the difficulty remains of determining whether the statutes in question are unreasonable prohibitions masking under the guise of regulation, or if regulations, whether, unduly and beyond the legitimate purpose to be served, they hamper and restrict plaintiffs' undoubted rights. In short, the question for decision comes down at last to, and is to be decided by, not a general statement of principles, for as to them there is no real dispute,[6] but a construction

[6] They are sufficiently stated for our purpose in Buck v. Swanson, D. C., 33 F. Supp. 377, dealing with a Nebraska statute of the same purport as the Fla. 1937 Act, and we need not restate them here. Other authorities not cited in Buck's case, which may be consulted are: For the plaintiffs: Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385; Hale v. Bimco Trading, 306 U. S. 375, 59 S. Ct. 526, 83 L. Ed. 771; State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394; People's Petroleum Producers v. Sterling, D. C., 60 F. 2d 1041, at page 1047; McLeaish & Co. v. Binford, D. C., 52 F. 2d 151; Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, at page 539, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280; Smith v. St. Louis & S. W. R. Co., 181 U. S. at page 255, 21 S. Ct. 603, 45 L. Ed. 847; McFarland

and interpretation of the statutes under attack, as to what they purport to do and whether they may constitutionally do that.

Both plaintiffs and defendants see plainly enough that this is so and by an analysis both of the statutes as a whole and of each section thereof, plaintiffs undertake to show their invalidity, defendants their validity. Plaintiffs pointing to the confiscatory provisions of Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6, by which the 1937 Act undertakes to permit performance, in Florida, of copyrighted music without compensation, urge upon us that not only these sections but the statute as a whole is invalid because, not a reasonable regulation of, but a repressive prohibition of, dealings in copyrighted music, it breathes and attempts to make effective throughout the unconstitutional spirit of repression and reprisal. Outlawing ASCAP and those in association with it, and expropriating their property for the use, without compensation, of radio broadcasters and others, it, they say in violation of every constitutional principle, operates as a kind of Bill of Attainder.

Defendants concede the invalidity of Sections 2-A, 2-B and 6. Indeed at one stage of the proceedings before us they offered to submit to a permanent injunction as to

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v. American Sugar Refining Co., 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899; Herbert v. Shanley Co., 242 U. S. 591, 37 S. Ct. 232, 61 L. Ed. 511; Buck v. Jewell-La Salle Realty Co., 283 U. S. 191, 51 S. Ct. 410, 75 L. Ed. 971; Remick & Co. v. American Automobile Accessories Co., 6 Cir., 5 F. 2d 411, 40 A. L. R. 1511.

For the defendants: Allen v. Riley, 203 U. S. 347, 27 S. Ct. 95, 51 L. Ed. 216, 8 Ann. Cas. 137; Fox Film Corp. v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010; Carbice Corp. v. Amer. Patents Corp., 283 U. S. 27, 51 S. Ct. 334, 75 L. Ed. 819; Straus v. American Publishers Ass'n, 231 U. S. 222, 34 S. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369; Interstate Circuit v. United States, 306 U. S. 208, 59 S. Ct. 467, 83 L. Ed. 610; Strassheim v. Daily, 221 U. S. 280, 31 S. Ct. 558, 55 L. Ed. 735; Ford v. United States, 273 U. S. 593, 47 S. Ct. 531, 71 L. Ed. 793; Stephenson v. Binford, 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721; Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 60 S. Ct. 618-625, 84 L. Ed. —; Tigner v. State of Texas, 60 S. Ct. 879, 84 L. Ed. —; United States v. Socony-Vacuum Oil Co., 60 S. Ct. 811, 84 L. Ed. —.

For both: Standard Oil Co. v. United States, 283 U. S. 163, 51 S. Ct. 421, 75 L. Ed. 926.

them. They insist, however, that the vice of these sections is peculiar and confined to them and does not pervade the Act, and that because this is so and particularly because the Act contains a separability clause, Sec. 12, and because, in the reference in the 1939 Act to sections of the 1937 Act as unrepealed, these sections were not included, these invalid sections should, by a kind of judicial surgery, be excised from the Act, leaving it to stand in its other provisions as an anti-monopoly statute.

[1] We do not think so. In complete agreement with what was said in Buck's case as to the invalidity of Sections 2-A and 2-B of the Nebraska law, we find invalid the similar sections of the Florida 1937 Law. For the same reasons, that they unreasonably interfere with and in effect deprive the owners of their copyright protection, by imposing unlawful conditions, in effect a servitude, in favor of those desiring to use them, upon the performing rights in their copyrighted musical compositions, and even under named conditions completely take the copyright, by permitting use without compensation, we find Sections 3, 4-A, 4-B, 5-A, 5-B and 6, also invalid.

There remain: Sections 1, 2-C and 3, in effect declaring ASCAP and similar societies illegal associations, outlawing its arrangements for license fees, and proscribing and making an offense, attempts to collect them; Section 7-B making persons, acting for such a combination, agents for it and liable to the penalties of the Act; Section 8 fixing the penalties; Section 9 giving the state courts jurisdiction to enforce the Act, civilly and criminally; and Sections 10-A, 10-B, 11-A and 11-B, prescribing procedure under it.

[2-6] It is, of course, the duty of a Court, if reasonably possible, consistent with the protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality, sustaining it, if it can be

done as a whole, or if that cannot be done, as to the part of it that is constitutional. But legislation, even though containing a separability clause, is not the enactment of isolated sections, but of a law as a whole. And the function of the Court, if there are invalid sections in a statute, is to search out, not isolated valid ones, but the valid law as a whole. To do this, a Court may, especially where the Act contains a separability clause, cut and pare and trim away its diseased parts, if, when this has been done, the live spirit of the law as enacted still remains, the living tree still stands. But, law making at last, is a legislative and not a judicial function and the search of the Court in the end is not for a law the legislature could or might have validly enacted but for the valid law it did enact. When, therefore, the vice of a statute runs through the whole of it, Courts may not, by lopping and paring away, create a statute which the structure and context of the Act as a whole shows the legislature did not intend to, indeed did not, enact. Williams v. Standard Oil Co., 278 U.S. 235, 241, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596; Sage v. Baldwin, D.C., 55 F.2d 968, and cited cases. Looked at in this light when the whole purpose of the 1937 Act to outlaw ASCAP and its contracts and to permit users in Florida to perform compositions, dealt with in them, without pay, is kept in mind, we think it clear that the Act, in spite of its separability provision, is so far indivisible that with all the "without pay" sections stricken as invalid, the whole Act must fall. For, it may not be supposed that the legislature intended to strike down the contracts and leave both ASCAP and its members, and the users in Florida who had been dealing with ASCAP, up in the air, with contracts already entered into and a considerable part of the compensation already paid, with no right in ASCAP or its members to collect

the balance due, and none in the Florida users, without paying again under separate arrangements, to use the music they had contracted and partly paid for. We, therefore, conclude as the Court did in Buck v. Swanson, supra, that the whole Act is invalid and must fall. We are the more inclined to this view because of the inconsistent provisions in the 1939 Act, and because, while specifically providing that nothing in it shall be construed to repeal any of the statutes of the state of Florida, pertaining to monopoly or restraint of trade "including . . . Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937", that Act by grouping all of these sections together makes it clear that they are regarded by the legislature as forming a harmonious whole and not as isolated and independent separate laws and as a whole, they must stand or fall together. In this view it is not necessary for us to determine whether as plaintiffs claim, Section 1 is invalid, for indefiniteness and uncertainty in its provision that it shall apply to combinations only where "a substantial number" of owners are concerned. Nor is it necessary to determine whether defendants are right in their counter to this claim of plaintiffs, that if the statute might be regarded as indefinite in its application as to some, it is certainly not so in its application to plaintiffs, for they admit that they own or control substantially all of the playable copyrighted musical compositions and they may complain of the statute, not as it applies to others but only as it applies to themselves.

[7] When it comes, however, to the 1939 Act we think the matter stands differently, for, having a valid purpose to compel disclosure to protect music users against imposition in the matter of copyrighted music and, except as to Sections 4-A and 4-C, which are not germane to that

purpose, having gone about effecting that purpose in a reasonable way, the Act as a whole is valid and may stand with those sections stricken from it. These sections constitute clear invasions of plaintiffs' rights under federal laws for which no warrant or justification can be found in the exercise of the state's police power. They may not stand.

[8, 9] As to 4-A, it seriously invades the rights of copyright owners to sell or license or refuse to sell or license as they please and by its compulsion, opens to the public the unlimited right to use copyrighted material upon terms the owner must fix generally in advance, and under conditions which are not only unreasonable in fact but are in their nature beyond the power of the state to impose. A copyright owner has a right to sell or withhold from sale the matter of and the rights under the copyright. He cannot be made to sell his product unless he wishes to. He can make one price to one user and an entirely different price to another. The effort of this section is to compel copyright owners, if they sell to one by a blanket license, to furnish schedules giving prices of the compositions so licensed, and to permit anyone desiring to do so, to perform any piece at the price so fixed. This is a taking of plaintiffs' property in its copyright without due process, and is beyond the power of the state.

The defendants seem to recognize that this would be so if the condemned provision were not coupled in the statute with a provision permitting dealing in copyrighted music under blanket licenses. They seem to think that the permission of the statute for two or more owners to combine in a blanket license authorizes the state to impose unreasonable restrictions upon that joining.

[10, 11] This will not at all do. It is not unlawful for one or more copyright owners merely to pool their com-

positions for one royalty for them as pooled. Standard Oil Co. v. United States, 283 U.S. 163, 51 S.Ct. 421, 75 L.Ed. 926. Section 4-A does not concern itself with price fixing or with combinations for price fixing; it deals only with the Act of pooling copyrighted pieces to sell them for one royalty, that is, with the selling of two or more pieces under one license. There is no conceivable public policy against such action by two or more owners and therefore no valid exercise of police power involved in a statute putting limitations on such trading. So long as persons do not unlawfully combine to fix prices, and the section in question does not deal with such unlawful combinations, there is no offense in mere pooling. And the mere fact that the statute permits to be done what without the statute it was already lawful to do, does not authorize it to impose unconstitutional restrictions upon that doing. "But a state may not impose any condition which requires the relinquishment of a right guaranteed by the National Constitution". Sage v. Baldwin, D.C., 55 F.2d 968, at page 969. The copyright laws guarantee to owners of musical compositions, protection against the use thereof without their consent. The state of Florida may not, therefore, as a condition to their being allowed to sell in Florida, a right they already have under the Federal constitution and laws, compel them to throw open to general public use the performing rights to their compositions at a price fixed in advance.

[12-15] Section 4-C is for the same reason invalid. It undertakes to impose unreasonable restrictions on copyright owners, restrictions having no reasonable relation to the public policy the Act is designed to further, that of disclosure for the protection of the public against fraud and imposition. In attempting to prevent individuals from contracting for the use of their copyrighted music upon any

price bases they and their customers may select, the Act goes clearly beyond and is wholly outside the reasonable exercise of the police power. People's Petroleum Producers v. Sterling, note 6, supra. The prohibition of the section, against basing the price upon programs in which a particular piece of music is not performed, is a completely arbitrary one and as such, it could not stand if the subject of the prohibition were uses unprotected by copyright. For, the end and aim of the prohibition is to limit the right to sell or license copyrighted musical compositions to contracts based solely upon performances per piece of each particular piece of music and to prohibit contracts arrived at on any other basis, however reasonable and well adapted to the needs of, and acceptable in, the business generally, of selling and licensing performing rights in copyrighted musical compositions. If the statute dealt with contracts for the hiring of the work and labor or the personal services, of animals or things and by its prohibition prevented, wages and salaries from being fixed except on the basis of piece work, the hire of horse, car or boat from being fixed, except upon the basis of each particular use, or journey, we think it would be admitted that such a statute would be invalid as an invasion of the right and liberty of contract, and not at all a reasonable exercise of the police power of the state. Certainly the state is in no better, the owner of a copyright in no worse position as to rights protected by copyright, "While the Copyright Act [17 U.S.C.A. § 1 et seq.] may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga v. Inter Ocean Newspaper Co., supra (215 U.S. 182, 30 S.Ct. [38], 39, 54 L.Ed. 150), 'The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period.'

"The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. v. Post Pub. Co., D.C.Mass., 27 F.2d 556; American Tobacco Co. v. Werckmeister, supra [207 U.S. 284, 28 S.Ct. 72, 52 L.Ed. 208, 12 Ann.Cas. 595]"; Buck v. Swanson, note 6, supra [33 F. Supp. 387].

For the reasons herein stated, the injunction prayed for will be granted against the enforcement of the 1937 Act and as to Sections 4-A and 4-C in the 1939 Act; as to the remainder of the 1939 Act, it will be denied.

Opinion in

Buck v. Swanson, 33 F. Supp. 377 (D. C. Neb. 1939).

(Nebraska Statute printed at p. 115, *infra.*)

In Equity. Action by Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers against Harry R. Swanson, as Secretary of the State of Nebraska, and others to enjoin the enforcement of a Nebraska statute relating to monopolies in the field of musical compositions.

Judgment for plaintiff.

Louis D. Frohlich and Herman Finkelstein, both of New York City, and L. J. TePoel, of Omaha, Neb., for plaintiffs.

William J. Hotz, Sp. Asst. to the Atty. Gen., of Nebraska, John Riddell, Asst. to the Atty. Gen. of Nebraska, Gordon Diesing, of Omaha, Neb., and Andrew Bennett, of Washington, D. C., for defendants.

Before GARDNER, Circuit Judge and MUNGER and DONOHUE, District Judge.

GARDNER, Circuit Judge.

This is a suit in equity in which plaintiffs seek to enjoin the enforcement of Legislative Bill 478 of the State of Nebraska, Laws, 1937, c. 138, and which by its terms became effective May 17, 1937.

The American Society of Composers, Authors and Publishers, a voluntary unincorporated association under the General Associations Law of New York, consisting of a large number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers, through Gene Buck its president, and certain individuals and corporations interested in copyrighted musical compositions are the plaintiffs. The secretary of state, the state treas-

urer, the auditor of public accounts, and the attorney general, all of the State of Nebraska, as well as the county attorneys of various counties of Nebraska, are the Defendants.

The statute, the enforcement of which is sought to be enjoined, is too voluminous to be set out herein *in haec verba,* but it will be found in the subjoined note. [The Statute is printed at p. 91, *infra.*]

There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123. publisher-members who constitute the principal publishers of the country. Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the Society and its members expiring December 31, 1940. The Society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing such licenses.

In Nebraska there are some 350 dance pavilions and ballrooms of a class that are independent of taverns where dancing is carried on incidentally. There are ten radio stations operating within the state, of which one is affiliated with the Columbia Broadcasting Network and one with the National Broadcasting Network. The other stations initiate their own vocal and instrumental musical programs. A

large number of theatres are users of music. There are 284,000 radio receiving sets in private homes, and about one-third of the population of the state at some time during the year attend dances and balls where music is played. In 1938 approximately $12,000.00 was collected by ASCAP from the theatres in the state. The largest radio station in Nebraska pays about $26,000.00 to the Society annually. Another group of stations paid the Society about $27,000.00 in 1938. There were 391 signed contracts with users of music in Nebraska introduced in evidence upon which an aggregate of approximately $20,000.00 was paid ASCAP during 1938. The Society is given, by its members, the exclusive right to make collections, fix prices, and otherwise carry on the public performance of all the musical compositions it controls. Some $6,000,000.00 was taken in for public performance rights by the Society in the United States during 1938. Fifty per cent of its net commissions was divided among the composer members and the other fifty per cent was divided among the publisher members. These groups are classified, but the classification does not seem to have any material bearing upon the issues presented. Of the popular music necessary for the successful operation of radio stations, dance-halls, hotels and theatres, the Society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the Society. The users of music in Nebraska cannot successfully carry on their business except they deal with the plaintiff Society because there is no place where nor person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the Society.

All the contentions of plaintiffs, as well as those of th Defendants, go to the constitutional validity of the statu involved. Whether or not, under the common law of N braska the contracts between ASCAP and its members, an between it and the users of music in Nebraska, are valid o not, we need not consider. That issue is not before us, bu the single question is the constitutional validity of the cha lenged statute.

It appears from the evidence that prior to the organiz tion of the Plaintiff Society, an author or composer wh had obtained a copyright for his production had no pract cal means of enforcing the exclusive right given him b the Copyright Act. He was not so equipped nor organize to discover violations of his rights, and it would requir much time and a large amount of money to enforce hi rights by means of litigation. Users of music, on the othe hand, who wished to buy the rights of public performanc for profit, were unable to ascertain who the copyright owne was and to whom to go. It was for the purpose of pro tecting the legal rights of its members in their copyrighte musical compositions against infringement by public per formance for profit that the Society was organized.

[1-3] The control or prohibition of combinations in re straint of trade and the prohibition of monopolistic practice is recognized as a proper exercise of the police power of th state. Nebbia v. New York 291 U. S. 502, 54 S. Ct. 505 Waters-Pierce Oil Co. v. Texas 112 U. S. 115, 29 S. Ct. 227 Bayside Fish Flour Co. v. Gentry 297 U. S. 422, 56 S. Ct 513; Crescent Cotton Oil Co. v. Mississippi 257 U. S. 129 42 S. Ct. 42; Central Lumber Co. v. South Dakota 226 U. S 157, 33 S. Ct. 66; Paramount Pictures v. Langer 23 Fed Supp. 890. While regulation of such public practices as ar deemed to be contrary to the public policy of the state is a proper exercise of its police power, yet the exercising of such power is subject to the restrictions imposed by the Federal Constitution, which must of course be recognized as the supreme law of the land. A state statute, though

enacted in pursuance of the police power, is void if in contravention of any express provision of the Federal Constitution or of a valid federal statute, or if it constitutes an interference with matters that are within the exclusive scope of federal power.

[4-6] The Act of March 4, 1909, Chap. 320, Sec. 1 (e) 35 Stat. 1073, Title 17, U. S. C. A., Secs. 1-63, enacted pursuant to the grant of power in Article 1, Section 8 of the Constitution, was intended to grant valuable enforcible rights to authors and publishers without burdensome requirements, in order to afford greater encouragement to the production of literary works of lasting benefit to the world. Washingtonian Pub. Co. v. Pearson 306 U. S. 30, 59 S. Ct. 397. The policy and purpose of the statute is to grant to the individual the right to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however impelling, is not material.

[7-8] It is contended that the state statute deprives copyright owners of the right to control public performances for profit of their copyrighted musical compositions, apart from the sale of sheet music. The copyright is distinct from the material object copyrighted. It is an intangible incorporeal right in the nature of a privilege or franchise quite independent of any material substance such as the manuscript or the plate used for printing. King Features Syndicate v. Fleischer (CCA2) 299 Fed. 533. The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms. He

has an individual right of exclusive enjoyment similar to that of a patentee of an invention. United States v. Dubilier Condenser Corp. 289 U. S. 178, 53 S. Ct. 554; United States v. American Bell Telephone Co. 167 U. S. 224, 17 S. Ct. 809; Burrow-Giles Lithograph Co. v. Sarony 111 U. S. 53, 4 S. Ct. 279; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 S. Ct. 72; Caliga v. Inter Ocean Newspaper Co. 215 U. S. 182, 30 S. Ct. 38; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (CCA7) 154 Fed. 358. The Society as an assignee of the rights of each author is a representative of that individual right. There are, too, individual plaintiffs before the courts, and they are interested individually in the public performance rights of particular musical compositions.

In American Tobacco Co. v. Werckmeister, *supra,* it is said [207 U. S. 284]:

> " . . . the law recognized the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced."

While the Copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga v. Inter Ocean Newspaper Co., *supra* [215 U. S. 182],

> "The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period."

[9-10] The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property,

may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. v. Post Pub. Co. (D. C. Mass.) 27 Fed. (2D) 556; American Tobacco Co. v. Werckmeister, *supra.*

Section 2 (A) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, "the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes."

[11] The right of public performance in connection with the composition includes separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing.

Section 2 (B) of the statute provides that,

> "In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall

> be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state."

Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights of ownership entitle him to sell or offer to sell, or to withhold from sale, as he may choose.

[12-13] The state statute can not be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use. Panhandle Eastern Pipe Line Co. v. State Highway Commission 294 U. S. 613, 55 S. Ct. 563.

[14] While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation, violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act.

The state statute contains a separability provision (Section 12), which provides that,

> "If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act."

[15] The Supreme Court of Nebraska has held that a statutory expression of the separability of various sections or provisions of a statute is an aid merely to judicial interpretation. First Trust Co. v. Smith 134 Neb. 84, 277 N. W. 762; Laverty v. Cochran 132 Neb. 118, 271 N. W. 354; Hubble Bank v. Bryan 124 Neb. 51, 245 N. W. 20. In Laverty v. Cochran, *supra,* the court in speaking of a severance clause contained in a statute said:

> "The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. Muldoon v. Levi, 25 Neb. 457, 41 N. W. 280. But the parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative. State v. Ure, 91 Neb. 31, 135 N. W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation."

[16] But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable.

[17] In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion.

Buck v. Harton, 33 F. Supp. 1014 (1940, M. D. Tenn.).

(Tennessee Statute printed at p. 132, *infra.*)

In Equity. Action by Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, and others against John W. Harton, as State Treasurer of Tennessee, and others to restrain the defendants from bringing any proceeding for purpose of enforcing a certain statute of the state of Tennessee against the complainants and others similarly situated, their representatives, employees or agents, and for other relief.

Judgment for the complainants in accordance with opinion.

Cornelius, McKinney & Gilbert, of Nashville, Tenn., and Schwartz & Frolich, of New York City (Charles L. Cornelius and William Neel McKinney, both of Nashville, Tenn., and Louis D. Frohlich and Herman Finkelstein, both of New York City, of counsel), for complainants.

Roy H. Beeler, Atty. Gen., for Tennessee, and W. F. Barry, Jr., Asst. Atty. Gen., for defendants.

Before HICKS, Circuit Judge, and DAVIES and TAYLOR, District Judges.

PER CURIAM.

This suit having been duly commenced on April 18, 1938 by filing a subpoena and bill of complaint in this Court, and personal service of copies thereof having been made on said date upon the defendants originally named in this action, and the defendants John W. Harton, John J. Jewell, Marion S. Boyd and Glenn Woodlee (said last named defendants having been substituted by stipulation in place and stead of Grover Keaton, W. B. Knott, W. T. McLain and A. T. Stewart), and this Court having duly granted a temporary injunction on December 1, 1938, and

this cause having come on for hearing on the 19th day of February, 1940 at the Courthouse of the District Court of the United States, Eastern District of Tennessee, at Knoxville, Tennessee, and complainants having appeared by Cornelius, McKinney & Gilbert, Esqs. (Charles L. Cornelius, William Neel McKinney, Louis D. Frohlich and Herman Finkelstein, of Counsel), and defendants having appeared by Honorable Roy H. Beeler, Attorney-General of the State of Tennessee, and Honorable P. W. Barry, Assistant Attorney-General, and this cause having been submitted upon all the papers and proceedings heretofore filed and had herein, and counsel for defendants having consented in writing to the entry of a final decree in favor of complainants upon said papers, and due deliberation having been had, the Court hereby makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. The State of Tennessee enacted a Statute entitled Chapter 212 of the Tennessee Laws of 1937 on May 21, 1937 which Statute became effective immediately. Said Statute is hereinafter referred to as the "Statute".

2. The plaintiff, American Society of Composers, Authors and Publishers, is a voluntary unincorporated association organized in 1914 under the General Associations Law of New York. Its membership consists of a substantial number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers. It brings this suit through Gene Buck, its President, who has been duly authorized to bring this suit on behalf of the Society and all its members. Other plaintiffs are certain individuals and corporations who are

members of the Society and are interested in copyrighted musical compositions. They are all citizens and residents of States other than Tennessee.

3. The State Treasurer, the Secretary of State and the Attorney-General all of the State of Tennessee, as well as the District Attorneys-General of various circuits of Tennessee, all citizens and residents of Tennessee, are the defendants.

4. There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers (hereinafter referred to as "ASCAP"), in the United States, and 123 publisher-members who constitute some of the principal publishers of the country. Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between ASCAP and its members expiring December 31, 1940. ASCAP has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing ASCAP to grant such licenses.

5. At the time the Statute was enacted, there were in existence 217 signed contracts between ASCAP and establishments in the State of Tennessee, engaged in the business of publicly performing copyrighted musical compo-

sitions for profit. During the year 1936, these licensees paid ASCAP $69,073.19 pursuant to such contracts. Among such licensees of ASCAP were the owners of 166 motion picture theatres, 38 dance halls, hotels and miscellaneous establishments and 13 radio broadcasting stations. Among the 13 radio stations in Tennessee licensed by ASCAP, five are affiliated with the Columbia Broadcasting System, four with the National Broadcasting Corporation, three with the Mutual Broadcasting System and four with the Dixie Network. Part of the programs broadcast by the affiliated stations emanate from points outside of the State and the remaining part initiate in the studios of such Tennessee broadcasters or elsewhere within the State. There are 459,900 radio receiving sets in private homes in the State of Tennessee. No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performance for profit. The cost of operation of ASCAP is approximately 17% of the gross amount received.

6. ASCAP is given by its members the exclusive right to make collections, fix prices for blanket licenses, and otherwise carry on the licensing of the right of public performance for profit of all the musical compositions copyrighted by its members. Fifty percent of such net income was divided among the composer- and author-members and the other fifty percent was divided among the publisher-members in accordance with a method of classification defined in the Articles of Association of ASCAP.

7. Prior to the organization of ASCAP, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large

amount of money to detect infringement and to enforce their rights by means of litigation. None of them secured any revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that ASCAP was organized.

8. ASCAP and its members, including the other complainants, come within the purview, terms, conditions, penalties, forfeitures, prohibitions, restrictions and regulative provisions of the Statute, and the members of ASCAP including complainants are affected in their rights by the terms and provisions thereof.

9. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of Complaint are of common and general interest to all the members of ASCAP who constitute a class so numerous as to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of ASCAP.

10. The value of the matter in dispute herein between each of complainants and defendants is in excess of the sum of $3,000, exclusive of interest and costs.

11. The copyrights of musical compositions owned by each of the corporate plaintiffs are worth in excess of $1,000,000, and the interests in copyrights of the individual plaintiffs, including the value of their renewal rights, are in excess of $100,000 as to each of them.

12. The contracts between the individual composer- and author-members of ASCAP, including the individual plaintiffs, and their respective publishers do not give the publisher the right to dispose of the right of public performance for profit, nor do they have any provision for payment by the publisher to the writers of any royalties secured from issuing such licenses. Before ASCAP was formed, there were no royalties from this source and since the formation of ASCAP, both writers and publishers have relied upon ASCAP to collect royalties from this field on behalf of both and to distribute it equitably for the equal benefit of writers and publishers.

13. Users of music, including users in Tennessee, have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of musical compositions. ASCAP's practice has been to grant blanket licenses to theatres according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Many of such users have for many years consistently refused to pay license fees to ASCAP or its members, until investigations were made by ASCAP, infringements ascertained and suits brought.

14. The radio broadcasting stations in the State of Tennessee are members of the National Association of

Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with ASCAP.

15. Under the contracts between ASCAP and said foreign societies, the latter are not required to, and never have, filed with ASCAP or with any State Authority, copies of the respective compositions copyrighted by their respective members, or lists of such compositions.

16. Many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1(e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over the sale or disposition of such phonograph records, music rolls or electrical transcriptions and they cannot compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions.

17. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Tennessee publicly for profit on any basis wherein the price for such performance would be fixed upon a so-called per piece basis. Licensing on such basis would not be feasible and would be tantamount

to depriving complainants of their exclusive right of public performance for profit.

18. The musical compositions of ASCAP's members and complainants have been for many years last past, and are presently being performed within the State of Tennessee in hotels, dance halls, taverns, motion picture theatres and broadcasting stations.

19. If the members of ASCAP including complainants tried to comply with the Statute they would each have to ascertain separately the nature of each establishment in the State of Tennessee, size of each orchestra, fame or celebrity of each artist, size of each establishment, its volume of business, its probable profits, elaborateness of the production, and size of its audience; they would each have to employ a corps of clerical assistants for the purpose of ascertaining the above information, investigators to detect infringement and competent counsel to obtain redress for the same; they would have to attempt to fix a separate price for each such establishment and to file a list with all the information required by the Statute; this would add substantially to the cost of the sheet music sold within the State of Tennessee, and would make it so great as to encourage infringement and interfere with, if not destroy, the sale of copyrighted sheet music in the State of Tennessee.

20. The Statute cannot possibly be complied with because:

(a) the public performance rights for profit fluctuate in value over the years; it is impossible for individual members of ASCAP, including the complainants, to specify at the time of publication of their musical compositions in the State of Tennessee what the price should be for various public performances for profit of their respective musical compositions;

(b) the members of ASCAP, acting singly, do not have the financial resources, experience or ability to obtain the information necessary to enable them to designate a fair price of the public performance for profit of their musical compositions in the State of Tennessee, or to detect or redress infringement of their compositions in that State;

(c) it would be impossible under the Statute to protect large investments made in motion pictures and dramatico-musical productions which contain individual musical compositions, the separate and unrestricted public performance of which would destroy the value of such motion pictures and dramatico-musical productions; complainants would be compelled by the Statute to refrain from copyrighting the compositions embraced in such motion pictures and dramatico-musical productions in order to protect their investment therein; this would materially reduce the number of works copyrighted annually;

(d) it would cost complainants approximately $300,000 to attempt to compile and file the list required by the Statute and $50,000 additional each year to supplement such list annually.

(e) the Statute cannot be complied with unless all complainants surrender their membership in ASCAP; this would entail a loss to each of the complainants in excess of $5,000 annually, representing the amounts which they normally receive annually from ASCAP; in some cases, such loss would be in excess of $50,000 annually; if not for the revenue received from ASCAP, complainant-publishers would be unable to continue in business.

21. The constant use of music by radio has shortened the life of a song resulting in a diminution ranging from 70% to 80% in the income to authors and composers from sales of sheet music and books of music. Sales of "hit"

songs have fallen from an average in excess of 1,000,000 copies prior to 1927, to an average of 30,000 to 150,000 today. The income from mechanical royalties diminished ninety-seven percent.

22. A system of blanket licensing is necessary in the field of public performance of musical compositions for profit because:

(a) Many request numbers are played as spontaneous encores in the course of an evening's entertainment in dance halls, cabarets, hotels and radio. This is possible only under some form of blanket license, which allows users to make last minute substitutions made necessary by operating difficulties, failure of artists to show up, etc.; except in rare instances, radio broadcasters in the State of Tennessee and elsewhere have always taken blanket licenses for the right of public performance for profit whether such licenses were obtained from ASCAP or from others; if the Statute were upheld, the broadcasters in Tennessee would attempt to obtain the benefit of blanket licenses by purchasing from publishers entire catalogues; such users would not and do not propose to deal with individual copyright owners for specified compositions; users in Tennessee have no intention of dealing with individual composers or authors.

(b) It is difficult for users to report accurately the music performed by them. Large establishments with expert staffs keep no logs or records of such performances; it is inevitable that small stations would have greater difficulty because of lack of facilities and would be required to spend as much for this purpose as larger stations with substantially larger income; the clerical expense alone would be greater than the license fees now paid to ASCAP; by the use of the reservoir of available music, under a blanket license, users are saved expendi-

tures that would be entailed if each musical composition had to be separately applied for, cleared and reported;

(c) Dance halls and taverns utilizing the services of orchestras habitually permit their orchestra leaders to choose the music played; such orchestra leaders buy a considerable part of their own copies of music although some of it is obtained in the form of professional copies; orchestra leaders cannot tell when they purchase the music, at what establishments the same will be played or where the same will be performed, or under what circumstances; the purchase of music is an important item which must be taken into consideration by them and orchestra leaders cannot afford to pay any sums in excess of the sums which they now pay for sheet music.

23. Compliance with the Statute would require ASCAP and its licensees to abandon the contracts between them and would also compel each complainant as well as all the members of ASCAP to rescind their respective contracts with ASCAP.

24. Although complainants will be able to license users of their music in the State of Tennessee without doing any act in said State, the Statute prohibits complainants from so doing without incurring the penalties of said Statute.

25. Said Statute is class legislation; it is aimed only at proprietors of music copyrights and no other copyrights, and it exempts the performance of musical works which are protected only at common law. A great many forms and varieties of copyrighted works other than musical compositions are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Tennessee.

26. Said Statute is not a reasonable exercise of the police power of the State of Tennessee; it was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated.

27. The system of licensing provided for in said Statute would deprive complainants and others similarly situated of their exclusive rights under the Copyright Act.

28. Defendants have threatened to and will enforce such Statute against these complainants and others similarly situated in the event that such complainants and others similarly situated refuse to comply with said Statute or do any of the acts made unlawful by said Statute.

29. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the Courts of the State of Tennessee; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 65 counties of the State of Tennessee where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Tennessee.

30. Unless this Court determines the invalidity of the Statute, complainants and others similarly situated will

be deprived of the exclusive rights granted to them under the United States Constitution and the Copyright Act, and will be without any remedy for the enforcement of such rights within the State of Tennessee, therefore deprived of their property and liberty without due process of law, and denied the equal protection of the laws, in contravention of Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2, and Article VI, Section 2 of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and are deprived of their rights in their respective copyrights under the Copyright Act of March 4, 1909 as amended.

31. Complainants have no adequate remedy at law and are relievable only in this Court of equity.

Conclusions of Law

I. The Statute makes it impossible for complainants to issue licenses in the State of Tennessee for the public performance for profit of their copyrighted musical compositions, except at the risk of incurring prohibitive civil and criminal penalties of said Statute, and the confiscation of their copyrights.

II. The Statute destroys, nullifies and repudiates copyrights granted by the United States Government to complainants and their predecessors in interest.

III. The said Statute violates the treaties made between the United States and foreign countries, under which the nationals of such foreign countries are given reciprocal rights with American citizens with respect to American copyright, and in reliance upon the continued effectiveness of which ASCAP entered into various con-

tracts with similar societies in said foreign countries, particularly with societies of the following countries: Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Rumania, Spain, Sweden and Switzerland.

IV. The Statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use, as is done by this Statute.

V. Said Statute denies to complainants equal protection of the laws, and denies to the complainants due process of law.

VI. Said Statute impairs obligations of contracts entered into between complainants and 217 users of music within the State of Tennessee; and contracts between members of ASCAP and ASCAP; and contracts between ASCAP and similar societies operating in foreign countries; and contracts between writers and composers and their respective publishers.

VII. Said Statute interferes with complainants' liberty of contract in the State of Tennessee and elsewhere.

VIII. Said Statute deprives complainants of their right of free access to the Federal Courts to maintain suits for infringement for the unlawful public performance for profit of their copyrighted musical compositions.

IX. Said Statute is vague, uncertain and indefinite and fails to apprise complainants and others similarly situated, of what acts they may omit or commit which would constitute a crime under said Statute.

X. Said Statute subjects complainants to a multiplicity of suits by each of the 217 users within the State of Tennessee with whom they have contracts, by each of the District Attorneys-General in the State of Tennessee and by the Attorney-General of said State.

XI. The said Statute violates Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2 and Article VI, Section 2 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

XII. Complainants have no adequate remedy at law and are relievable only in this Court of equity, and if complainants are not afforded the equitable relief prayed for in the Bill of Complaint, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under said Statute, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate; the penalties for violation of the Statute are so drastic that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the Courts of the State of Tennessee.

XIII. Complainants are entitled to a decree granting a permanent injunction restraining defendants, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing said Statute against complainants and others similarly situated, their representatives, employees, agents or any of them; from demanding that lists of complainants' musical compositions and other data be filed; from taking any steps to adjudicate the

ownership of complainants' copyrights; from attempting to appoint a receiver; from interfering with existing contracts between complainants and others, including the Society and citizens and residents of the State of Tennessee; from enforcing or threatening to enforce against citizens or residents of the State of Tennessee, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with the Society; from prosecuting criminally the members of the Society including complainants and their representatives or agents, or any of them, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act; and generally from doing any act or thing to carry out or enforce any of the provisions of said Statute.

XIV. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of Complaint are of common and general interest to all the members of ASCAP who constitute a class so numerous as to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of ASCAP; Gene Buck, as President of ASCAP, is authorized to bring this suit on its behalf.

XV. Said Statute and each and every part and section thereof is invalid and is hereby declared to be unconstitutional, illegal and void, and a decree may be entered making such declaration and granting the relief hereinabove provided for, and denying any relief to the defendants.

The Washington State Statute.

(Considered in Buck v. Gallagher, 307 U. S. 95.)

Chapter 218, Washington Laws, 1937, page 1070, reads as follows:

AN ACT in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of constitutional provisions; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of this state; repealing certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on nonresidents, prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690 of Remington's Revised Statutes.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 2690 of Remington's Revised Statutes is hereby repealed.

Section 2. It shall be unlawful for any person who, without the consent of the owner thereof, shall cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or by knowingly selling a substantial copy of any substantial part thereof.

Section 3. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: Provided, however, Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: Provided, further, This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: Provided, further, Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups

and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: Provided, further, Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works.

Section 4. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the secretary of state of the State of Washington, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or association, foreign or domestic, shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The secretary of state shall require two copies of said list, one of

which he shall keep on file, the other shall be forwarded to the offices of the state treasurer at Olympia.

Section 5. The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

Section 6. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: Provided, however, Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or association of persons, as prohibited by this act, need not file any such list.

Section 7. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price-fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this act, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentali-

ties in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based in threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: Provided, further, The legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Washington.

Section 8. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations and persons,

even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisons in their behalf, as they may use all of the privileges available to the citizens of this state in general, and the use at any time of any general privilege available to any citizen of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act; and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith; and the acceptance of the general privileges of the State of Washington by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence ~~within the state~~ at any time, shall be deemed equivalent to and construed to be an appointment by such non-resident or non-residents, as the case may be, of the secretary of state of the State of Washington to be his or their true and lawful attorney upon whom may be served all summons and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be of the same legal

force and validity as if served on him or them personally within the State of Washington. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2) with the secretary of the State of Washington, or in his office, and such service shall be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combination, entity, or organization, as aforesaid: Provided, That notice of such service and a copy of the summons or process shall be forthwith sent by registered mail requiring personal delivery, by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendants return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof: Provided, further, The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups, or entity, a reasonable opportunity to defend the action: Provided, further, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

Section 9. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-resident corporation, person, or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the prosecuting attorney of any county where complaint is made of any violation, shall institute injunction proceedings against said persons in the superior court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding section; and the court shall enjoin all persons

from violating the provisions of this act and the constitutional provisions prohibiting price fixing, monopolies, and combinations, and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents, shall be enjoined by the court from aiding or furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants, as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint the county auditor as receiver for the copyrighted works and property of defendants, tangible or intangible, and all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the court's orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all

choses of action and all sums due on contracts and licenses, and hold the same subject to the order of the court; and all persons holding licenses or contracts with any defendant combination or entity, shall pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this act, and to compel any defendant to abide herewith: Provided, Any sums paid on licenses violating this act shall only be continued in the court's discretion or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this act: Provided further, In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this act or the court's orders ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this act, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then convene the State Anti-Monopoly Board, as herein now created, consisting of the state treasurer and the state auditor, and said board shall meet in the county where the suit is filed, and the superior judge hearing the cause shall be an advisory member of said board; and said board, of which the state treasurer shall be chairman, shall have only one function, the discouragement of price-fixing and monopolies, and the court shall then submit to said board the single question of the establishment of license rates for the use of those copyrighted works controlled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopolies and

price-fixing, and preventing violations of this act, the board shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, and the court shall not be deemed thereby to have divested itself of any of its jurisdiction by so doing; after determining such rate, the said Anti-Monopoly Board shall immediately advise the receiver of its findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then, if said finding is approved by the court, issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receiver's fees or attorney's fees shall be allowed, and the prosecuting attorney shall be attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the court's orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said

defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Washington, and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Washington; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day perod, and take oath that they will abide by the future orders of the court and the provisions of this act, then the court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: Provided, however, The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the court's judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the court's judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Washington, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assign-

ment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.; and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Washington, who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund: Provided, further, The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

Section 10. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders, are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aiders and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and defendants as may thus appear in the action,

for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: Provided, however, This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool, or monopoly of their rights or property without full and complete due process of law.

Section 11. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500), or imprisonment in the county jail for not more than six months, or both such fine and imprisonment.

Section 12. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, sub-

division, section or part of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

Section 13. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective superior judges hearing the causes may issue orders against said defendants in any county, but in the event any of the various county proceedings enter into the stage of receivership, as herein provided, then the judges hearing the respective causes shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

1937 Florida Statute.

(Ch. 17807, Laws, 1937)

(Considered in Gibbs v. Buck, 307 U. S. 66; Buck v. Gibbs, 34 F. Supp. 510)

AN ACT declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which determine the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composers, copyright owners, or their heirs, successors, or assigns, to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of any combination as herein declared unlawful in determining license fees and other rights; to require the author, composer and publisher to specify upon the musical composition the selling price thereof, including public performance for profit; to declare that any purchaser thereof, who pays such price therefor shall have the right to render such music privately or publicly for profit; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit, made with any combination, firm or corporation herein declared unlawful, to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit without interference by such unlawful combination; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting

and radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside of the State of Florida, against the collection of license fees or other exactions by such out of the State affiliates for or on account of any combination herein declared unlawful; to provide all liability for any infringement of copyrighted musical compositions conveyed by radio broadcasting, air, wire, electrical transcription or sound producing apparatus, or by personal performance coming outside of the State of Florida and used herein to rest exclusively on the out of the State person, firm or corporation originally sending the same into this State for use herein; to provide penalties for the violation hereof; to empower the State's Attorney, under the direction of the Attorney General, upon the complaint of any party aggrieved by any violation hereof to proceed to enforce the penalties hereof against such combination and any of its members, agents or representatives; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions herein; to provide for the recovery of costs, expenses and attorney's fees; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States

who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to

collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intra-state transaction within this State, and shall be subject to the terms and penalties of this Act.

Section 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

Section 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails to affix on the musical composition the selling price, and collect the same, for private or public performances for profit,

at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

Section 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

Section 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any

collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

Section 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

Section 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this State from whence copyrighted vocal or instrumental compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm

or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 5-A. Any person, firm or corporation who owns, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

Section 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such

persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner

of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manmen set forth in this section, shall be considered for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibition set

forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

Section 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State.

Section 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Section 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a

fine of not less than $50.00 or more than $5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

Section 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 10-A. Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

Section 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Section 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending, a petition praying that the defendant or defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

Section 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a fine of $100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order,

and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs and attorney's fees.

Section 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, inoperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

Section 13. Nothing in this Act shall be construed as repealing any other laws or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

Section 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State, June 10, 1937.

1939 Florida Statute.

(CHAPTER 19653, FLORIDA LAWS, 1939)

(Considered in Buck v. Gibbs, 34 F. Supp. 510)

AN ACT relating to public performing rights in copyrighted musical compositions and dramatico-musical compositions; defining the same; regulating licensing of same; prescribing filing fees; making provisions for a resident agent in the state; levying a tax on the gross receipts from the licensing of such rights within the State of Florida; providing for the enforcement of this Act; the promulgation of rules and regulations, governing the enforcement of this Act; appropriating the proceeds of the tax and fees levied herein and repealing certain laws in conflict herewith.

Be It Enacted by the Legislature of the State of Florida:

Section 1. As used in this Act, "person" means any individual, resident or non-resident, of this state, and every domestic or foreign or alien partnership, society, association or corporation; the words "performing rights" refer to "public performance for profit"; the word "user" means any person who directly or indirectly performs or causes to be performed musical compositions for profit; the term "blanket license" includes any device whereby public performance for profit is authorized of the combined copyrights of two or more owners; the term "blanket royalty or fee" includes any device whereby prices for performing rights are not based on the separate performance of individual copyrights.

Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical

composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal.

Section 3. The list provided for in the preceding section shall be made available by the Comptroller to all persons for examination, and taking of copies, in order that any user of such compositions in this state may be fully advised concerning the performing rights therein, and avoid being overreached by false claims of ownership of said performing rights, and also avoid committing innocent infringements of said works. The Comptroller may, if in his discretion he deems it necessary, in order to prevent such overreaching and to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, cause a list of all such copyrighted material filed with him to be published once a year or oftener in a form and medium which he shall deem suitable for said purpose. A duplicate of any list so filed by any such person shall at his request be certified by the Comptroller and shall by the Comptroller be given or delivered to such person, who shall exhibit the same on demand of anyone to whom such person seeks to sell, license or otherwise dispose of said performing rights.

Section 4-A. It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty or fee covering more than one, or all, of such compositions owned or controlled by the members of such association unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such compositions within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such

composition. To this end, there shall be filed with the Comptroller, either as a part of the list required by Section 2 hereof or as a separate document by such copyright owner, or by such association in behalf of such owner, a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any other copyrights. Such schedule of prices may contain reasonable classifications determined by use and function, or either, of the users of said compositions, with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications. Any copyright owner may at his election fix one price which shall be applicable to each rendition of each of such compositions owned by him except to the extent that he elects to name specific compositions and to fix other prices for each rendition thereof, and said prices shall remain in force and effect until a new schedule of prices with respect to the performing rights to such compositions has been similarly filed in the office of the Comptroller, at any time, at the election of such owner, changes in prices to become effective seven days from the date of filing thereof. The schedule of prices provided for herein shall be made available by the Comptroller to all persons for examination and the taking of copies and may be published by him in the same manner as provided in Section 3 hereof.

Section 4-B. Any person issuing a blanket license for performance rights shall file with the Comptroller within thirty days from the date such blanket license is issued a true and complete copy of each such license issued or sold

with respect to performance within this state, together with the affidavit of such person that such copy is a true and complete copy of the original and that it sets forth each and every agreement between the parties thereto with respect to such performing rights. The Comptroller shall charge for filing such contracts the same fee allowed clerks of the circuit court for similar services.

Section 4-C. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition, to make any charge or to contract for or collect any compensation as a condition of using said performing rights based in whole or in part on any program not containing any such composition, and any such charge or contract for compensation shall be valid and enforceable only to the extent that it is based and computed upon a program in which such composition is rendered.

Section 4-D. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of in this state public performing rights in or to any musical composition or dramatico-musical composition to make any charge or to contract for or collect any compensation for the use or performance of any such composition that has not been listed with the Comptroller as provided in Section 2.

Section 5. At the time of filing the information required in Sections 2 and 3, the owner of said performing rights shall execute and deliver to the Secretary of State on a form to be furnished by the Secretary of State, an authorization empowering the Secretary of State to accept service of process on such person in any action or proceeding, whether cognizable at law or in equity, arising under this

Act, and designating the address of such person until the same shall be changed by a new form similarly filed; and service of process may thereafter be effected in this state on such person in any such action or proceeding by serving the Secretary of State with duplicate copies of such process; and immediately upon receipt thereof the Secretary of State shall mail one of the duplicate copies by registered mail to the address of such person as stated on authorization last filed by him. A filing fee of $5.00 shall accompany this notice and the Secretary of State shall deposit same in the General Revenue Fund of the State of Florida.

Section 6. No person shall be entitled to commence or maintain any action or proceeding in any court with respect to such performing rights, or to collect any compensation on account of any sale, license or other disposition of such performing rights, in this state, except upon pleading and proving compliance with the provisions of this Act.

Copies, certified by the Comptroller as such, of each or all of the lists, license agreements, affidavits and other documents filed with the Comptroller pursuant to the requirements of this Act, shall be furnished by the Comptroller to any person upon request at the prices regularly charged by a clerk of the circuit court for such work. Such certified copies shall be admitted in evidence in any action or proceeding in any court to the same extent as the original thereof.

Section 7. From and after the effective date of this Act there is hereby levied, and there shall be collected, a tax for the act or privilege of selling, licensing, or otherwise disposing of performing rights in such compositions in this state, in an amount equal to three per cent of the gross receipts of all such sales, licenses or other dispositions of performing rights in this State, payable to the State Comptroller on or before the fifteenth day of March, 1940, with

respect to all such gross receipts for the portion of the calendar year 1939 after the effective date of this Act, and annually thereafter, on or before the fifteenth day of March of each succeeding year, with respect to the gross receipts of the preceding calendar year. A return on a form prescribed by the Comptroller shall be made by all persons subject to this tax on or before the 15th day of March of every year which shall accompany a remittance of the tax due.

The Comptroller shall have authority through his authorized agents to examine and audit the books and records of any person he may deem subject to the tax or fees under this Act and may require such persons to appear before him at his office in the Capitol, in the City of Tallahassee, Florida, with such records and papers as may be necessary after giving thirty days' notice to such person through said person's authorized agent, the Secretary of State.

The Comptroller shall also have authority through his authorized agents to examine and audit the books, records and accounts of any licensee or user making payments for use of public performing rights in the State of Florida to any person in order that the Comptroller may determine or check on gross receipts of those selling or licensing public performing rights in the State of Florida. Any person refusing the Comptroller or his duly authorized agents access to such books, records and accounts shall be subject to penalties prescribed in Section 9 hereof and may be required to appear in person with all books, papers and accounts required by the Comptroller at the Comptroller's office in the Capitol, Tallahassee, Florida, within ten days after receipt of notice which the Comptroller shall send by "registered mail, return receipt requested."

Should the Comptroller determine that any person liable for any tax or fees under this Act has made an incorrect return or has made no return at all, or has failed to pay

any tax or fees due, the Comptroller shall after determining the amount of such tax or fees due the State of Florida, from the best information at his command, certify such claim for delinquent taxes to said person through his duly designated agent, the Secretary of State, and unless payment of such delinquent tax is received within thirty days of delivery of said notice to the Secretary of State the Comptroller shall apply to a Circuit Judge in Leon County for the appointment of a receiver to take over and administer all assets of said delinquent taxpayer in the State of Florida.

The Circuit Judge, upon the Comptroller's application properly authenticated, shall appoint some agent of the Comptroller as receiver, to serve without further compensation, but who shall be allowed all actual expenses. After posting such bond as the judge may determine proper, the said receiver shall take over and administer the affairs of said delinquent taxpayer within the State of Florida, collect accounts and do all things necessary to protect the interests of both the State of Florida and the said delinquent taxpayer from such collections as he may make, he shall first pay the expenses of the receivership and any litigation incident thereto and the tax plus interest at the rate of 2% per month or fraction thereof from the last day of the year for which the tax was due.

After having satisfied the claims of the State and paid all costs of the receivership, the receiver shall make a return to the court, which shall order all assets returned to the taxpayer.

Section 8. It shall be unlawful for any person, without the consent of the owner thereof, if said owner shall have complied with the provisions of this Act, publicly to perform for profit, in this state, any such commission, or for any person knowingly to participate in the public performance for profit of such composition, or any part thereof.

Section 9. Any violation of this Act shall constitute a misdemeanor, to be punished as provided elsewhere in the laws of this state.

Section 10. Any person or persons who negotiates or collects or attempts to collect license fees or other exactions or acts in any capacity whatsoever as a representative or agent for any person owning public performing rights of any copyrighted composition shall be subject to all the penalties in this Act provided for violations thereof.

Section 11. Any person in this State aggrieved by reason of any violation of this Act may sue thereof in the circuit court in which he resides or in the circuit in which the violation took place to recover any damages as the result of the violation of the terms of the Act or to require specific performance under the provisions of this Act and shall be entitled to recover his costs, including reasonable attorneys' fees to be fixed by the court.

Section 12. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act, anywhere within this state, it shall be the duty of the State's attorney in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both under the terms hereof, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided. In civil actions such proceeding may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such

petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 13. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Secion 14. After the costs and expenses of enforcing this act and the collection of the taxes and fees herein levied and imposed are deducted, the amount of which costs and expenses are hereby appropriated to be paid from the proceeds of this act, there is hereby appropriated the entire balance paid into the Comptroller under and by virtue of this act to the General Revenue Fund of the State of Florida.

Section 15. All laws or portions thereof whether general, special or local, which relate to the same subject matter as this Act and which are inconsistent with the provisions of this Act, are hereby superseded by the provisions of this Act to the extent that such inconsistency exists.

Nothing contained in this Act shall be so construed as to impair or affect the obligation of any contract or license which was lawfully entered into prior to the effective date of this Act.

Provided, however, nothing in this Act shall be construed to repeal, supersede or modify any of the statutes of the State of Florida pertaining to monopoly or restraint of trade, including but not limiting the generalities of the foregoing Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937. Provided, further, the revenue provisions of this Act shall take effect

immediately it becomes a law and persons having contracts to sell public performing rights to users in the State of Florida shall file copies of such contracts with the Comptroller within thirty days of the date this act becomes a law and shall within ninety days of the time this Act becomes a law comply with other provisions of this Act that require filing of any date.

Section 16. Any section in this Act, or any part of any section that shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions hereof.

Section 17. This Act shall take effect immediately upon its becoming a law.

The Nebraska Statute.

(Considered in Buck v. Swanson, 33 F. Supp. 377)

Chapter 138, Nebraska Laws, 1937, reads as follows:

AN ACT relating to monopolies, declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appoint-

ment of a receiver and injunctive relief and the dissolution of such combination as here declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio broadcast, air, wire, electrical transcription, or sound production apparatus, or by personal performance coming from outside this state, and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof, to proceed to enforce the penalties hereof against such combination and any of its representatives, members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before sell-

ing or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

Introduced and read first time February 15, 1937.
Final Form Sent to Printer May 12, 1937.

Be It Enacted By The People of The State of Nebraska:

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright

owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such combination herein declared unlawful, from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs, dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered, or permit to be rendered, such copyrighted vocal or instrumental musical compositions privately or publicly for profit within this state through personal performance, or through radio, or any instrumentality or sound producing apparatus, shall be and the same is hereby declared unlawful and illegal; and such license fees or other exactions shall not be collected in any court within the boundaries of this state; and each collection or attempted collection of such license fee or other exaction by such combination or its agents, representatives, members, stockholders or interested parties shall be a separate offense hereunder; and any such combination of authors, composers, publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this state; and such fixing of prices for use or rendition of copyrighted musical compositions within this state by such unlawful combination and the collecting or attempting to collect such license fees or other exactions by it or for its stockholders, members or other interested parties within this state is hereby declared illegal and in restraint of trade, and such collection or attempted collection thereof is declared to be an illegal intrastate transaction within this state and shall be subject to the terms and penalties of this Act. In any action, civil or criminal, instituted

under the provisions of this Act, it shall be *prima facie* evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity.

Section 2. (A). All authors and composers, and their heirs and assigns, shall have within this state all the benefits conferred by the Copyright Laws of the United States, being the act of March 4, 1909, c. 320, Section 1 (e), 35 Stat. 1073, Title 17, U. S. C. A. Each author, composer and publisher shall act independently of any and all substantial number or numbers of other authors, composers and publishers, and also independently of any such combination as in Section 1 hereof declared unlawful, in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this state and pays the selling price so specified thereon to the seller or publisher of said copyrighted musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered within this state, the said copyrighted musical composition by persons individually

or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radios, loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise within this state, and the same may be so rendered either privately or publicly for profit when so purchased and paid for without further license fees or other exactions; and such copyright owner or proprietor, in the event of such payment, shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private purposes or for public performance for profit by such purchaser within this state.

(B.) In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C.) Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D.) Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution

of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such composition; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25¢) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the persons, firms or corporations who shall file said copies from time to time; and provided further, said Secretary of State shall deposit all the fees received hereunder weekly with the State Treasurer who shall credit said fees to the general fund of the state.

Section 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be found thereby; and any member, representative or agent of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Section 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

(B.) When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible within this

state, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 5. (A.) Any person, firm or corporation who owns, leases, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this state, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered within this state, by the personal performance of artists, singers musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever within this state, by the personal performance of artists, singers, musicians, copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

(B.) When such theatre or theatres, moving picture house or houses, or other places for amusement or performance within this state is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this state, or supplying such persons, firms, or corporations in this state with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly ren-

dered for profit, then such person, firm or corporation outside this state shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect within this state, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theatres, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from where said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or

by furnishing a person or persons to play or sing such music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through such affiliate or affiliates, then any defendant in such action may interplead such affiliate or affiliates in such action; and any judgment which may be rendered in favor of the copyright owner shall be paid and satisfied by such affiliate or affiliates; and, if paid or satisfied by the defendant user in this state, such defendant shall be subrogated in said action or otherwise to all rights of the plaintiff in said judgment as against said affiliate or affiliates, whether the latter is or are a party or parties in said action or not; and in any event such affiliate or affiliates shall be liable to such user to the full extent of his liability to such copyright owner, in the absence of any agreement to the contrary; and any combination declared unlawful by Section 1 of this Act which is the owner or proprietor of or controls the copyrighted vocal or instrumental musical compositions, its agents or representatives shall be and are hereby prohibited from suing for infringement, loss or damage within the boundaries of this state, for the use or rendition of such copyrighted vocal or instrumental musical compositions so originating or emanating because such persons, firms or corporations used, rendered or performed the same within this state; the use or renditions by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers,

players and musicians sent into this state, or otherwise, of such copyrighted musical compositions within this state in the manner set forth in this section, shall be considered, for the purpose of this Act, as intrastate business of this state and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this state.

Section 7. (A.) Any person, firm or corporation within this state who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this state, and service of any process against such combination may be had upon such representative or the agent of any such representative as herein defined within this state; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

(B.) Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Section 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any

person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than $5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Section 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B). The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

(C). Or, the Attorney General, on the complaint of any party aggrieved, because of the violation of any of the terms of this Act anywhere within this state, shall proceed in the District Court in any county in which all or any part of the offense or violation was committed, to institute action against any combination defined as unlawful by Section 1 hereof, and against the representatives or agents of any such combination, either in a criminal action to enforce the penalties hereof, or in a civil action to enforce all rights hereunder, or to dissolve any such combination as declared

unlawful by Section 1 hereof, or he may proceed by both civil and criminal actions; in such action or actions, the plaintiff shall be the State of Nebraska; and any interested party may, upon application, be granted leave to intervene in such a civil action.

(D). The District Court shall, in such dissolution or other civil suit, upon the application and intervention in said action of any member, stockholder or other interested party of said unlawful combination, adjudicate the ownership of any copyrighted vocal or instrumental musical composition theretofore owned or controlled by said unlawful combination; and furthermore, such District Court shall have and is hereby granted the power and authority to appoint a receiver and to issue injunctive and mandatory temporary and permanent orders in reference to any of the issues involved in such action; and any person, firm or corporation within this state who is a user in any manner of any copyrighted vocal or instrumental musical compositions theretofore owned or controlled by such unlawful combination may, upon application, intervene in such action and therein have adjusted, determined and adjudicated all rights for or against the person, firm or corporation whom the Court shall finally determine to be the owner or proprietor of such copyrighted vocal or instrumental musical compositions; and said parties shall be permitted no other remedy in any other court within the boundaries of this State, whether the same be for damages, infringement or otherwise, until final decree has been had in said action determining the ownership and terms for use of such copyrighted musical compositions.

Section 10. (A). Any person, firm or corporation within this state aggrieved by any violation of the terms hereof by any unlawful combination, as defined in Section 1 hereof, or any of its representatives or agents, may proceed in his

or its name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated, the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect a final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Section 11. (A). In any action, either civil or criminal, that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the case;

and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon determine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant or defendants to furnish and file such information as ordered. A copy of said order shall be mailed to each defendant at his or its last known address, which shall be deemed sufficient notice and service upon said defendant or defendants; or the same may be served by mail in the same manner upon each attorney of record for the defendant or defendants, and when so served, the same shall be deemed notice and service upon the defendant or defendants for whom said attorneys appear of record.

(B). If said defendant or defendants shall fail to furnish plaintiff or his or its attorney, or file with the Clerk of the Court in which the action is pending, said copy or copies of said documentary evidence, facts, figures, records, books and data set forth in said order within the time specified in said order, the Court shall adjudge said defendant or defendants guilty of contempt of court, and the Court shall assess a fine of $100.00 against such of the defendants for each and every day that such defendant or defendants fails to comply with said order; and judgment shall from time to time be rendered therefor, and the plaintiff may collect the same against the defendant or defendants with 6% interest thereon and the costs, including expenses and attorney's fees to be fixed by the Court, in the same manner as other judgments are collected in this state. The Court shall find and determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, expenses and any attorney's fees that may be allowed.

Section 12. If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-

enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.

Section 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Nebraska.

Section 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.

Tennessee Statute.

(Considered in *Buck* v. *Harton*, 33 F. Supp. 1014. This Statute is substantially identical with Ch. 218, Washington Laws, P. 1070, involved in *Buck* v. *Gallagher*, 307 U. S. 95, and before this Court in the case at bar.)

(CHAPTER 212, TENNESSEE LAWS, 1937)

SENATE BILL No. 1020

AN ACT entitled an Act in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Tennessee by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the laws of the State of Tennessee prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of law; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Tennessee; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; defining the jurisdiction and duties of courts of record, the duties of the district attorneys, receivers, the state treasurer and the secretary of state; providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on non-residents; prohibiting certain acts; and providing penalties for violation hereof.

Be it Enacted by the General Assembly of the State of Tennessee:

Section 1. It shall be unlawful for any person without the consent of the owner thereof, to cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or to knowingly sell a substantial copy of any substantial part thereof.

Section 2. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the State, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: Provided, however, Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: Provided, further, This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicily perform his or her individual copyrighted work or works: Provided, further, Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group of persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher

and more inequitable rates per piece for music licenses in this state than in other states: Provided, further, Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works.

Section 3. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the Secretary of State of the State of Tennessee, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or associations, foreign or domestic shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The Secretary of State shall require two copies of said list, one of which he shall keep on file, the other shall be filed in the offices of the state treasurer.

Section 4. The foregoing list of names and titles provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

Section 5. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: Provided, however, Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or group, or association of persons, as prohibited by this act, need not file any such list.

Section 6. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the consitutional provisions relating to monopoly and price fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this Act, and the administration thereof, shall at all times effectuate the enforcement, the true intent and meaning of the United States copyright laws within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme de-

signed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: Provided, further, the legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Tennessee.

Section 7. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations

and persons, even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisions in their behalf, and they may use all of the privileges available to the citizens of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act; and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith; and the acceptance of the general privileges of the State of Tennessee by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider or abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time, shall be deemed equivalent to and construed to be an appointment by such non-resident or non-residents, as the case may be, of the secretary of state of the State of Tennessee to be his or their true and lawful attorney upon whom may be served all summonses and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be

of the same legal force and validity as if served on him or them personally within the State of Tennessee. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2.00) with the secretary of the State of Tennessee, or in his office, and such service shall be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combinations, entity, or organization, as aforesaid: Provided, That notice of such service and a copy of the summons of process shall be forthwith sent by registered mail requiring personal delivery by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendant's return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof; Provided, further, The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups, or entity, a reasonable opportunity to defend the action: Provided, further, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

Section 8. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-resident corporation, person or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the district attorney of any county where complaint is made of any violation shall institute injunction proceedings against said persons in the proper court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding

section; and the court shall enjoin all persons from violating any provisions of the act and the constitutional provisions prohibiting price fixing, monopolies, and combinations; and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents shall be enjoined by the court from aiding and furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint a receiver for the copyrighted works and property of defendants, tangible or intangible, and of all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the court's orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all choses of action and all sums due on contracts and licenses, and

hold the same subject to the order of the court; and all persons holding licenses or contracts with any defendant combination or entity, shall pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this act, and to compel any defendant to abide herewith: Provided, Any sums paid on licenses violating this act shall only be continued in the court's direction or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this act: Provided, further, In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this act or the court's orders ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this act, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then determine the question of the establishment of license rates for the use of those copyrighted works controlled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopolies and price-fixing, and preventing violations of this act, the court shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, after determining such rate, the court shall immediately advise the receiver of the findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public

performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receiver's fees or attorney's fees shall be allowed, and the district attorney shall be the attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the court's orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Tennessee and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Tennessee; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day period, and take oath that they will abide by the future orders of the court and the provisions of this act, then the

court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: Provided, further, The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the court's judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the court's judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Tennessee, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all of the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assignment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.: and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Tennessee who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund; Provided, further, The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

Section 9. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aiders and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and defendants as may thus appear in the action, for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: Provided, however, This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool or monopoly of their rights or property without full and complete due process of law.

Section 10. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500.00), or imprisonment in the county jail for not more than six months or both such fine and imprisonment.

Section 11. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, subdivision, section or pa ' of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

Section 12. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective courts hearing the causes may issue orders against said defendants in the county, but in the event any of the various county proceedings enter in the state of receivership, as herein pro-

vided then the judges hearing the respective cause shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

Section 13. BE IT FURTHER ENACTED, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed May 18, 1937.

BYRON PAPE
Speaker of the Senate.

WALTER M. HAYNES
Speaker of the House of Representatives.

GORDON BROWNING
Governor.

APPROVED
5-21-37

Opinion on Final Hearing in *Buck* v. *Gallagher*, 36 F. Supp. 405 (W. D. Wash., Dec. 23, 1940).

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*, Complainants, *vs.* PHIL H. GALLAGHER, as State Treasurer of Washington, *et al.*, Defendants.	In Equity Cause No. 606

Before: HANEY, Circuit Judge, and BOWEN and BLACK, District Judges.

HANEY, Circuit Judge.

This is a suit to enjoin enforcement of a Washington statute on the ground of its unconstitutionality. The cause has been submitted on an application for a permanent injunction.

Briefly stated, the statute attacked declares it to be unlawful for separate copyright owners to pool the copyrights in order to fix prices, collect fees, or issue blanket licenses for the use of such copyrights, except where the licenses are issued assessing rates on a "per piece" system of usage. The detailed provisions of the statute need not be discussed.

The bill prayed for a permanent injunction restraining defendants from taking any act or proceeding under the statute, and for a decree declaring such statute unconstitutional. It is alleged in the bill that on February 13, 1914, a small group of composers, authors and publishers organized a voluntary unincorporated non-profit association under the laws of New York, which they designated as the American Society of Composers, Authors and Publishers, hereafter called the Society, for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members. It was further alleged that there are approximately 123 publisher members of the Society and about 1000 writer and composer members of the Society; that such members assign their respective exclusive right of public performance for profit in their respective musical compositions; that similar organizations exist in foreign countries, and the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all members of such foreign societies; and that the Society's blanket license permits the licensee to use many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies.

It appears that the members assign to the Society the exclusive right of public performance, and the Society then has the exclusive right to permit by licenses, licensees to use or not to use the compositions of the Society's members, to fix the prices for licenses, to sue for infringement, and in general, to manage the right of public performance in the same manner as the owner of the copyright.

The motion to dismiss on behalf of the defendants was based on several grounds, one of which was: "That mere unconstitutionality, even assuming it to exist, does not warrant injunctive relief, but that the facts alleged must bring the case within the recognized rules of equity relating

to injunctions, and that complainants have not done so." The motion to dismiss filed by intervener K M O, Inc., states a number of grounds, one being that the plaintiffs are not entitled to equity because they were a monopoly. Although no answers have been filed, we may treat the motions to dismiss as answers. Intervener Lockhart argues the monopoly question, but his motion to dismiss does not present such question. We treat his motion as an answer and amended so as to present the question.

Regarding the completeness of the monopoly of the Society, it is said in *Buck* v. *Swanson* (D. C. Neb.), 33 F. Supp. 377, 386:

> "* * * Of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, the society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff Society because there is no place where nor person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society."

Mr. Justice Black in *Gibbs* v. *Buck*, 307 U. S. 66, 81, says:

> "* * * This combination apparently includes practically all (probably 95%) American and foreign copyright owners controlling rendition of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single com-

positions, and can, and does, require purchasers to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination."

In the instant case the testimony of the operators of two of the largest radio broadcasting stations in Washington was that it would be impossible to operate such stations without the music controlled by the Society. The Society has neither submitted evidence, nor made argument to the contrary.

On the hearing for an injunction pendente lite, we dismissed the cause for lack of jurisdiction. *Buck* v. *Case,* 24 F. Supp. 541. On appeal our decree was reversed with directions to take evidence on the jurisdictional question. *Buck* v. *Gallagher,* 307 U. S. 95. Subsequently, we referred the case to a special master for the taking of evidence on the question, and directed him to make findings. The special master found facts disclosing jurisdiction in the court below. Believing that the evidence supports such findings, we sustain them as not being clearly erroneous.

Plaintiffs contend that the Washington statute is unconstitutional for a number of reasons, and rely on *Buck* v. *Swanson* (D. C., Neb.), 33 F. Supp. 377, *Buck* v. *Harton* (D. C. Tenn.), 33 F. Supp. 1014, and *Buck* v. *Gibbs* (D. C. Fla.), 34 F. Supp. 510, holding somewhat similar statutes unconstitutional. Before passing on that question, it is necessary to determine whether or not plaintiffs may invoke the aid of a court of equity. If a party "has been engaged in an illegal business and has been cheated, equity will not help him." *Wheeler* v. *Sage,* 68 U. S. (1 Wall.) 518, 529. In other words, before plaintiffs may invoke the aid of a court of equity, they must come into court with clean hands. *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240, 244. If the Society exists in violation of the Sherman Anti-Trust Act, it, and the members composing it, are not entitled to a decree for its benefit.

Section 1 (15 U. S. C. A. Sec. 1) of the Sherman Anti-Trust Act provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *."

Section 2 (15 U. S. C. A. Sec. 2) of such act provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Whatever the distinction between these two sections may be,[1] the Supreme Court has recently said that Congress, by the act in question, "extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 498. The "effects" mentioned were "business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." Id., p. 493. Such effects were brought about by "contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide market-

[1] *C. E. Stevens Co.* v. *Foster & Kleiser Co.*, 9 Cir., 109 F. (2d) 764, 770.

ing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market." Id., p. 497.

There can be little question here that the Society has the power to fix prices for the right to publicly perform compositions for profit. Likewise, it has restricted substantially all competition in the sale of such right, because it has all such rights. Since the interstate commerce feature is conceded to be present, the Society clearly violates the act in question (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223) unless the right to publicly perform for profit is not embraced within the act. Upon that point the act says nothing expressly about rights or commodities. The statute is aimed at "restraints" of trade and commerce, and not at the "subjects" of the trade or commerce. Rights may be and often are the subject of trade or commerce, and the Sherman law limits restraints of trade in "rights" as well as commodities. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49. The restraint here is the power acquired by the assignments of the Society's members, to deal in a right acquired by copyrights, and thus we have a contract or combination in restraint of trade. *Straus* v. *Am. Publishers' Assn.*, 231 U. S. 222, 234.

Plaintiffs contend that if the activity of the Society "affects trade or commerce, it promotes rather than restrains it." Here, we are not concerned with such question. Congress has decided that if such a combination has acquired power to fix prices, it is an illegal combination in restraint of trade. Plaintiffs further contend that the power to fix prices, as here, is not the odious "price-fixing" condemned by the act in question. They say that while a gallon of oil is the same no matter who sells it, musical compositions are not gallons of oil, but each of them is different. As we have said before, it is immaterial what

the subject of the trade or commerce may be. The fact is that the Society has acquired the power to fix the prices at which rights of a particlar nature may be purchased by prospective users. We think that is sufficient under the statute.

Buck v. *Swanson* (D. C. Neb.), *supra*, *Buck* v. *Harton* (D. C. Tenn.), *supra*, and *Buck* v. *Gibbs* (D. C. Fla.), *supra*, do not involve the point herein taken.

Let the bill be dismissed.

BERT EMORY HANEY,
Bert Emory Haney, Circuit Judge.
JOHN C. BOWEN,
John C. Bowen, District Judge.

I concur in the result.

LLOYD L. BLACK,
Lloyd L. Black, District Judge.

Decision of Supreme Court of Louisiana Invalidating Louisiana Statute Imposing License Fee of $5,000 for Privilege of collecting royalties on copyrighted music in Each Parish of the State.

***State of Louisiana* v. *J. Studebaker Lucas*, 199 So. 126.**

(Decided November 4, 1940.)

Appeal from the Twenty-fourth District Court, for the Parish of Jefferson.—L. ROBERT RIVARDE, Judge.

Eugene Stanley, Attorney General of Louisiana, Niels F. Hertz, Special Assistant Attorney General, John E. Fleury, District Attorney, Ernest M. Conzelmann, Assistant District Attorney, for Appellants.

Nicholas G. Carbajal, Louis D. Frohlich, and Herman Finkelstein, for Appellees.

O'NEILL, C. J.:

The defendant was indicted for violating Act No. 137 of 1934, which undertakes to impose a license fee for the privilege of collecting any money or other valuable consideration for rights, royalties or rents on copyrighted music books, recorded music for mechanical reproduction, or radio programs. The license fee is $5,000 to be paid to each and every parish in which any such collection is made or attempted to be made. And a fine of $2,000 and imprisonment for a term not exceeding a year is imposed upon any one who violates the act. The defendant filed a motion to quash the indictment on the ground that the statute was unconstitutional. The court sustained the motion, declared the act unconstitutional, and dismissed the prosecution. The State is appealing from the decision.

The principal ground on which the defendant pleaded that the statute was unconstitutional—and the ground on which the plea was sustained—was that the so-called license fee was exorbitant and oppressive, and had the purpose and effect not of licensing the business which it was imposed upon, but of destroying the business, which was not objectionable to the public in any sense. Hence the defendant pleaded—and the judge maintained—that the statute was violative of the Fourteenth Amendment of the Constitution of the United States, in that it denied the defendant the equal protection of the law, and deprived him of his property without due process of law, by depriving him of the benefit of his copyrights, and of his right to conduct the business in which he was engaged.

The so-called license fee is exorbitant, and the terms of the statute are oppressive. A license fee of $5,000 to be paid to each and every parish in the State means that the license fee would amount to $320,000 for the privilege of doing business throughout the State. The gross amount collected by the defendant in 1939, the year in which he was indicted, on the business done in the whole State, was $65,297.39. The gross amount collected on the business done in that year in the Parish of Jefferson, in which the defendant was indicted, was $2,228.62. The average gross amount collected per parish was $1,053.18. It would be impossible for any person, firm or corporation engaged in the business to collect enough to pay the license tax in any parish. A statute which purports to levy a license tax upon a particular business or occupation, but which makes the tax so exorbitant that no one can pay it and carry on the business or occupation profitably, does not in fact license the business or occupation, but undertakes to abolish it. Such a statute is violative of the Fourteenth Amendment of the Constitution of the United States in so far as it deprives any one of his right to carry on a lawful business or occupation.

The judgment is affirmed.

Decree in

State of Washington v. *American Society of Composers, Authors and Publishers.*

(June 8, 1936, unreported.)

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, *ex rel.* G. W. HAMILTON, Attorney-General,

Plaintiff,

—vs.—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association, et al.,

Defendants.

FILED Superior Court Thurston Co. Wash. JUNE 8 3:01 PM 1936 ELLIS C. AYER, Clerk By Edwidge LaFond, Deputy

No. 16114

DECREE

This matter coming regularly on before the court for a hearing upon the petition of the defendant, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, and all of the parties being present and represented by their attorneys; and the court having considered the files in said cause and having considered testimony offered at said hearing and the contents of the Petition which have not been denied, and having heard the arguments and advice of counsel, and being fully advised in the premises,

IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The American Society of Composers, Authors and Publishers (hereinafter for brevity called the "Society"), a voluntary association of seven or more members, comprised exclusively of authors, composers and music publishers, was formed in the year 1914 under the laws of the State of New York, for the purpose of protecting and enforcing the so-called "small performing rights" of copyrighted musical works of such members, and to grant licenses to music users for the giving of public performances for profit of such works.

2. That since such formation, the Society has conducted its business, operations and activities in every State of the Union, as a central bureau for the issuance of licenses to music users for the public performance for profit of the works of its members, and through which performing rights of copyrighted musical works may be cleared, and such a bureau is necessary to protect the performing rights of authors, composers and music publishers, and is a convenience and necessity to the users of music in obtaining the performing rights.

3. That it is necessary for authors, composers and music publishers to belong to the Society to effectively enforce and protect the performing rights in their respective copyrighted works, and the Society is a convenience and a necessity to the users of music who will be considerably embarrassed, impeded, delayed and put to considerable expense if they had to deal separately with each piece of music performed and with each owner of the performing rights of each such piece.

4. That the Society was formed for lawful purposes and that the plan being used by the American Society of Com-

posers, Authors and Publishers whereby licensing agreements are entered into between license users in the State of Washington and the American Society of Composers, Authors and Publishers, an unincorporated association, and wherein the defendant association acted as a clearing house in the representation of the copyright owners of said music, and as the same is being conducted, is approved as a working, feasible plan and is not violative of any of the laws of the State of Washington, or of the Constitution.

5. That the Society serves a beneficial and useful purpose as a clearing house through which users may obtain and clear performing rights in musical compositions.

6. The Receiver is hereby directed to collect all amounts due from contract license users up to and including the 31st day of December, 1935, save and except such users as have paid directly to the Society during said period, in respect of works of the present membership of the Society.

7. It is further ordered and the Receiver is hereby directed to turn over, assign, transfer and deliver to the defendant Society all rights, goods, properties, assets, agreements, licenses, books, records, papers, documents, memoranda and accounts, of every name, nature, character or description whatsoever which came into his possession, custody or control by virtue of his appointment as such Receiver, or to which he became entitled by virtue of such appointment, save and except any moneys on hand and claims for money due to January 1, 1936 (less costs and disbursements and expenses of the receivership.)

8. That all orders made herein, assigning, conveying, transferring to or vesting in the Receiver copyrights or rights in copyrights, are hereby vacated, set aside and annulled, and any and all such assignments of copyright or

rights in copyrights are hereby cancelled and annulled, and the Receiver is hereby directed and ordered to make, execute, acknowledge and deliver to the Society and to its members, in such form as may be necessary to carry out the purpose and intent of this order within five days of the entry of this decree, such papers and documents as may be required or necessary to reassign and retransfer unto the Society and its members all copyrights and rights therein claimed by the Receiver under such orders.

9. That any rights in the works of the members of the Society under any assignment, license or permit heretofore made, issued or granted by the Receiver, are hereby declared to be and shall be of no force, effect or validity beyond the 1st day of January 1936.

10. That the complaint herein be dismissed upon the merits.

11. It is further ORDERED, ADJUDGED AND DECREED that the Receiver, upon duly complying with the terms and conditions of this decree, shall be discharged and his bond exonerated.

DONE in open court this 8th day of June, 1936.

(Signed) D. F. WRIGHT,
Judge.

[SEAL]

BLANK
PAGE

SUPREME COURT OF THE UNITED STATES.

No. 312.—October Term, 1940.

Frank Marsh, as Secretary of State of Nebraska, et al., Appellants,
vs.
Gene Buck, Individually and as President of The American Society of Composers, Authors and Publishers, et al.

Appeal from the District Court of the United States for the District of Nebraska.

[May 26, 1941.]

Mr. Justice Black delivered the opinion of the Court.

Most of the questions presented by this case are the same as those that were raised in Nos. 610 and 611, this day decided. Here, as there, at the request of ASCAP and its co-complainants a federal District Court composed of three judges enjoined various state officials from enforcing a state statute[1] aimed primarily at price-fixing combinations operating in the field of public performance of copyright music.[2] Here, as there, the complainants alleged, and the defendants denied, that enforcement of the act had been threatened. Here, as there, the court below found that threats had been made, that some of the sections of the act were invalid, that the invalidity of those sections permeated the whole, and that the state officials should be enjoined from enforcing any of the numerous provisions of the act. But, as in the Florida case, the court below proceeded on a mistaken premise as to the rôle a federal equity court should play in enjoining state criminal statutes. Here, there was no more of a showing of exceptional circumstances, specific threats, and irreparable injury than in the Florida case. In his brief in this Court, the Attorney General of Nebraska stated that 'Appellants, as law enforcement officers, sincerely hope that no action under this law will be required. None was threatened

[1] Neb. Laws 1937, ch. 138.
[2] 33 F. Supp. 377.

before nor since the suit was started." With one possible exception, the record bears out the statement of the Attorney General; there was no evidence whatever that any threats had been made, but in his answer the Attorney General stated that he would "enforce the act against the complainant Society . . . [if] the complainant Society would operate in the State of Nebraska in violation of the terms of the statute by conniving and conspiring to fix and determine prices for public performance of copyrighted musical compositions . . . ." As we have just held in *Watson* v. *Buck*, it was error to issue an injunction under these circumstances.

In other material respects also, this case is like the Florida case. The court below failed to pass on what we consider the heart of the statute because of what it regarded as the pervading vice of the invalid sections. But section 12 of the Nebraska statute is similar to section 12 of the Florida statute and provides that "If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity of enforceability of any other part or parts of this Act." The legislative will is respected by the Supreme Court of Nebraska,[3] and the court below should have followed state law in this regard. That part of the statute on which the court did not pass—and the part which the Attorney General said he stood willing to enforce if violated—set up a complete scheme for the regulation of combinations controlling performing rights in copyright music. On the authority of *Watson* v. *Buck*, the decision below is reversed and the cause is remanded with instructions to dismiss the bill.

It is so ordered.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

[3] See Petersen *v.* Beal, 121 Neb. 348, 353, quoting and approving the following excerpt from Scott *v.* Flowers, 61 Neb. 620, 622-623: "The general rule upon the subject is that where there is a conflict between an act of the legislature and the constitution of the state, the statute must yield to the extent of the repugnancy, but no further [Citing authorities]. If, after striking out the unconstitutional part of a statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder. In other words, the legislative will is, within constitutional limits, the law of the land, and when expressed in accordance with established procedure, must be ascertained by the courts and made effective."